Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

KENNETH A. PELS, SR.,
PETITIONER

VS.

DISTRICT OF COLUMBIA BAR ASSOCIATION, BAR COUNSEL OFFICE OF PROFESSIONAL RESPONSIBILITY, and BOARD OF PROFESSIONAL RESPONSIBILITY
RESPONDENT

Petition for Writ of Certiorari to
the District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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8 HPP

QUESTION PRESENTED

Whether the District of Columbia Court of Appeals erred when it entered a judgement imposing a greater obligation under the terms of a contract upon Petitioner than exists in the provisions of the contract itself in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

A. DISTRICT OF COLUMBIA BAR ASSOCIATION, a tribunal that directs the review of professional responsibility matters, controls the functions for the District of Columbia Bar, and interfaces with members, and individuals whom they represent.

B. DISTRICT OF COLUMBIA BAR ASSOCIATION, OFFICE OF COUNSEL, AND THE BOARD OF PROFESSIONAL RESPONSIBILITY, that operates and functions at the direction of the District of Columbia Court of Appeals, and abides by the rules of that tribunal.

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B. District of Columbia Court of Appeals, January 30, 1995, (Appendix A, PG. 1, et seq.).

C. District of Columbia Court of Appeals, December 12, 1996, (Appendix B, PG.24).

JURISDICTION

A. The judgment sought to be reviewed was entered on January 30, 1995, by the District of Columbia Court of Appeals. A Petition for Rehearing en banc was denied on December 12, 1995. The petition for writ of certiorari was filed within 90 days of that date.

B. Pursuant to 28 U.S.C. 1254 (1), the jurisdiction of the Supreme Court of the United States is invoked.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Fifth Amendment to the Federal Constitution.

B. Fourteenth Amendment to the Federal Constitution.

STATEMENT OF THE CASE

Petitioner entered into a standard retainer agreement, fee plus costs, with a client. The client misunderstood the terms and complained to the District of Columbia Bar Association. The District of Columbia Bar reviewed the complaint. It concluded that costs existed, that the client wasn't notified of costs, and the client did not have to pay costs. This conclusion is not supported by facts in the record.

The client affirmed in her testimony that the contract costs were subsumed in the attorney's fees. Counsel opined that the contract contained a fee plus costs provision. This is not a case for review concerning the Bar's responsibility. It centers on the court's order directing the Petitioner to pay more money than the contract requires. The opinion of the District of Columbia Court of Appeals mandates payments beyond the amount collected on behalf of the client.

The Petitioner is excluded from recovery of advanced costs on behalf of the client. The District of Columbia Court of Appeals acknowledged the costs provision in the retainer. The costs were ongoing until the contract was closed. The denial of payment forces upon Petitioner a denial of his rights to collect costs advanced under the contract. The judgment deprives Petitioner of his right under the Fifth and Fourteenth amendments of the Federal Constitution to receive the benefits of his contract.

The District of Columbia Court of Appeal's reasoning that additional money is to be paid abrogates the provisions of the retainer contract. The reasoning of that Court causes Petitioner to pay-out funds that go beyond what the contract obligated Petitioner to pay. This ruling is a contradiction, acknowledging that costs exist, and thereafter, in effect ordering that costs advanced be refunded to the client. No where in the opinion does the Court address the over-extension of payments.

The agency, the District of Columbia Bar, refused to provide information as to how the client claimed that the contract precluded the recovery of costs advanced on her behalf. The Bar extended the obligation of Petitioner. The contract contradicts this position.

This is not an appeal from the actions stating violations of a code of responsibility. This is an appeal to decide the violations of the agency and lower court that precludes Petitioner from the full benefits to contract, and to receive a return of money advanced to a client under the terms of the contract. No one disputes that costs existed.

REASONS FOR GRANTING THE WRIT

THE DISTRICT OF COLUMBIA COURT OF APPEALS ERRED WHEN IT AFFIRMED THE POSITION OF THE DISTRICT OF COLUMBIA BAR AND HEARING PANEL, WHICH FOUND THAT PETITIONER PAID-IN-FULL THE AMOUNT OWED IN SETTLEMENT OF A CONTRACT, AND YET HAS FORCED PETITIONER INTO THE PAYMENT OF ADDITIONAL MONEY BEYOND THE OBLIGATION OF THE CONTRACT. THE ORDER VIOLATES THE PETITIONER'S RIGHT TO CONTRACT AND TO ENFORCE THE PROVISIONS OF THE CONTRACT ENTERED INTO BETWEEN PETITIONER AND THE CLIENT.

The District of Columbia Court of Appeals like other State Courts reviews contracts between counsel and clients. The contract reviewed is a fee plus costs contract. The costs advanced and owed by the client are vested in counsel. The counsel has a right to money paid out of private funds.

The States legislate and administer the practice of law and regulate dealing with clients. This legislative activity cannot offset a counsel's right to retain money advanced. The State significantly involved in the control of the contract cannot extend the provisions of the contract and order money advanced to be returned to the client. The action to date forces Petitioner to return money already advanced and expended. It forces a payment beyond the money obligated in the settlement.

The court opines to the argument to pay out additional money and abrogates the contract right for the collection of costs. This collection of costs could only occur as noted in the opinion when the bill of the Doctor was corrected.

The contract clause, Federal Constitution Art. I, Sec. 10, prohibits states from enacting any law that impairs a contract right. The contract clause prevents substantial impairment of a contract. Impairment is the destruction of most or all of a party's rights under a contract. The ruling precludes Petitioner from enforcing his rights and receiving benefits under the provisions of the contract.

There is a public interest in protecting rights. The enforcement should not impair the right to enforce the contract. Abrogating the provision for costs owed does not require the payment for doctor's costs waived. The ruling is a substantial impairment of a right to Petitioner's money causing the problem.

The due process clause of the Fourteenth Amendment conditions the exertion of regulatory power by requiring that the end shall be accomplished by methods consistent with due process, that the regulation shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. See Nebbia v. New York, 291 U.S. 502, 525, 54 S.Ct. 505, 78 L. Ed. 940 (1934).

A regulation valid in a given circumstance, may be invalid for another sort, or for the same business under other circumstances, because the reasonableness of each regulation depends upon the relevant facts, See Nebbia v. New York, ibid, p. 525.

The right to contract is fundamental and includes the privilege of electing those with whom one is willing to assume contractual relations. See NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 103, 57 S.Ct. 645, 81 L. Ed. 921 (1937).

While contract rights are settled by the law of the State, that law does not determine the procedure of courts of the United States sitting as courts of equity, or the costs which are taxable there, or control the discretion exercised in matters of allowances. See Dodge v. Tulleys, 144 U.S. 451, 456, 12 S.Ct. 728, 36 L. Ed. 501 (1892). Dodge entitled a lawyer to reasonable counsel fees for work completed. In this instance Petitioner is entitled to reasonable costs, and is not obligated to pay further costs. The costs were determined and admitted into evidence in the administrative hearing.

The government may not arbitrarily deprive an individual of a constitutionally protected right. The right to contract is protected by substantive due process. The Supreme Court case law parallelling Petitioner's right to be free from the government's arbitrary exercise of discretion, in every case denounces deprivation of individual's recognized right. See Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L. Ed. 216 (1952) and Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 71 S.Ct. 624, 95 L. Ed. 817 (1951) (associational rights); Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L. Ed. 791 (1935) (14th amendment rights); Shachtman v. Dulles, 225 F. 2d 938 (D.C. Cir. 1955) (liberty interest in right to travel).

Moreover, Petitioner sought the reasons for the client's testimony for admitting that she misunderstood the fee plus costs provisions in the retainer. A request was made to the agency for all conversations by and between the client and agency. The request was denied. The key is Fed. R. Civ. Proc. 26(b)(3), which provides an exception to the work product doctrine when "the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." The government's action is in contravention of the principles enunciated by the U.S. Supreme Court. The reasons for the statement of misunderstanding should have been made known to the hearing tribunal so that it is not a reckless disregard for the truth.

There is a requirement for government counsel to produce, upon request, evidence favorable to Petitioner. If the evidence had been disclosed there is a reasonable probability that the outcome of the proceedings would have been different. In Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215 (1963) the Supreme Court held that the constitutional right to due process requires government counsel to furnish exculpatory evidence to criminal defendants.

A "bedrock question" is whether government attorneys committed "fraud on the court" under the definition of Fed. R. Civ. Proc. 60(b).

A formal request was made to clarify the testimony of the client. It contradicts the charges by the prosecutor. The prosecutors alone were having conversations with the client. The client misunderstanding the contract provisions is key to the case disposition. The prosecutors knew of the conversations with the client. Providing the information were furnished, it would prove exculpatory for Petitioner.

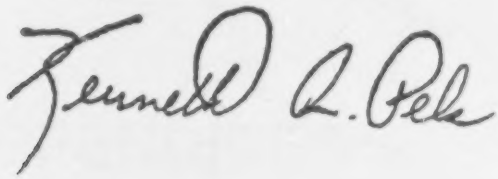
There is an unqualified duty of scrupulous candor that rests upon government counsel in all dealings with the court, to characterize conduct. The government will maintain a continuing scrutiny of the law and evidence, and promptly confess error if the situation warrants it.

By allowing the case to go before the appellate courts and the Supreme Court of the United States with knowledge that the record was incomplete, and with knowledge that all relevant material to which the defense is entitled had not been turned over, the Government committed a fraud on the court. See R.H. Rison et. al. v. John Demjanjuk, et. al., 115 S.Ct. 295, 130 L. Ed. 2d 205, (1994)

CONCLUSION

For the reasons stated, the Petitioner urges this Court to grant the writ of certiorari.

Respectfully Submitted,



KENNETH A. PELS, SR.

Petitioner

APPENDICES

APPENDIX A-ORDER OF THE DISTRICT OF COLUMBIA COURT OF APPEALS
No. 93-BG-1395
In RE: Kenneth A. Pels, Respondent
A Member of the Bar of the
District of Columbia Court of Appeals

On Report and Recommendation of the Board
on Professional Responsibility
(Argued Dec. 7, 1984 Decided Jan. 30, 1995).
Before Farrell and King, Associate
Judges and Gallagher Senior Judge.

Farrel Assc. Judge: This disciplinary matter, various members of the Board on Professional Responsibility recognized, tests the resolve of this court in enforcing the rule reaffirmed in In re Addams, 579 A. 2d 190 (D.C. 1990) (en banc), That in virtually all cases of misappropriation sanction unless it appears that the misconduct resulted from nothing more than simple negligence. "Id at 191. Majorities of the Hearing Committee (the committee) and the Board on Professional Responsibility (the Board) concluded that respondent misappropriated client funds and did so recklessly, i.e. as a result of more than simple negligence. The committee majority recommended disbarment in light of *Addams*, as did two Board members. The other three Board majority members recommended that disbarment be stayed as to all but a three-month period of suspension, to be followed by probation subject to practice and financial monitors. The four dissenting Board members concluded that respondent's conduct involved no more than simple negligence and recommended suspension for six months.

We agree with the majorities of the Committee and the Board that respondent misappropriated client funds, that his conduct in doing so was reckless, and that *Addams* requires his disbarment. We reject the recommendation of some Board members of a stay of disbarment, as we believe that would enervate, if not destroy, the deterrent force of the rule reaffirmed in *addams*. And we decline to apply the mitigation rule of *In re Kersey*, 520 A.2d 321 (D.C. 1987), and succeeding cases, so far applicable only to attorney misconduct caused by substance abuse or mental illness,[1] to this case of reckless misappropriation caused by neither. The sanction we impose may seem harsh as applied to an attorney not claimed to have been dishonest and who undertook here "his first representation of a plaintiff in a contingent fee personal injury matter."[2] But in *Addams* we placed upon the attorney the burden of proving "extraordinary circumstances," 579 A.2d at 191, that justify departure from the presumptive rule of disbarment for conduct such as respondent's that jeopardizes client funds held in trust and undermines public confidence in the bar. No such exceptional circumstances have been shown to us in this case.

I.

On February 27, 1992, Bar Counsel filed a petition for discipline alleging that respondent had (1) commingled personal funds with those of a client in a non-escrow bank account; (2)misappropriated client settlement funds he was obligated to retain for payment to the client's third-party

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[1] *See,e.g., In re Temple*, 596 A.2d 585 (D.C. 1991); *In re Miller*, 553 A.2d 201 (D.C. 1989).

[2] See Separate Opinion of Board member Donnenfeld, at 1.

medical care providers; (3) failed to maintain records and render accounts to the client; and (4) failed to deliver promptly client funds.[3] Respondent answered by admitting that "funds held on the complainant's behalf were commingled in a non-escrow account,"but otherwise denied the allegations of misconduct.

A hearing committee conducted an evidentiary hearing and made detailed written findings of fact. Thereafter, the Board majority, while recognizing its obligation "to accept the hearing committee's factual findings if those findings are supported by substantial evidence in the record, viewed as a whole, "*In re Micheel*, 610 A.2d 231, 234 (D.C. 1992), summarized the evidence independently with repeated citations to the record, and only then sustained "the factual findings of the Hearing Committee regarding [r]espondent's misappropriation and recklessness [as] supported by substantial evidence." We in turn set forth the facts as found by the Board (and the committee) mindful of our obligation to accept "the findings of fact made by the Board unless they are unsupported by substantial evidence of the record...." D.C. Bar R. XI, 9 (g) (1994).

Elizabeth Langlois retained respondent in August 1986, while she was in the hospital recovering from injuries sustained in a motor vehicle accident. She signed a retainer agreement providing for respondent to represent her in a possible personal injury action arising from the accident.

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[3] Specifically, respondent was charged with violating DR 9-103 (A) (commingling); DR 9-103 (A) (misappropriation); DR 9-103 (B) (3) & Rule 1.15 (a), (b) (failure to maintain records and to render accounts to a client); and Rule 1.15 (b) (failure to promptly deliver client funds). Because respondent's conduct in question took place between 1989 and 1991, the charges were brought under both the Code of Professional Responsibility and the present Rules of Professional Conduct, which became effective January 1, 1991.

Respondent's fee was to be thirty-three percent of any amounts recovered. Ms. Langlois agreed "to pay, in addition to Attorney's fees, all reasonable and necessary costs as incurred in this matter"; respondent was to " pay all expenses and charges from monies received from any recovery or settlement."

In December 1988, respondent negotiated a settlement of the claim with the insurance carrier for the other driver, and on January 6, 1989, the insurance company sent him a check for $20,000, the proposed settlement amount, payable to Ms. Langlois and respondent as her attorney. Respondent wrote Ms. Langlois two letters dated January 9, 1989. One reviewed the reasons why he recommended accepting the $20,000 settlement offer. The other outlined the proposed distribution of the proceeds. It began by stating that "[w]e[4] will waive the recoverable cost incurred in this litigation and I am waiving $300.00 of the fee and $500.00 of the Administrative Cost." It then represented that, in addition to the one-third amount ($6,666.66) respondent was entitled to receive under the retainer agreement, settlement funds would be withheld for distribution to four medical providers, including, $1,772 to Dr. William Launder for examination and evaluation, $345.00 to Neurodiagnostic Center ("Neurology" in the letter), and $185.00 to Greater Laurel Beltsville Hospital. From the remaining amount an additional $500.00 would be deducted for "Approximate Administrative and Miscellaneous Expenses," and the waived $800.00 in partial fees and administrative costs would be restored to the amount, leaving a balance due Ms. Langlois of $11,206.34. Ms. Langlois accepted the settlement and agreed to the proposed distribution.

4 Respondent was then a principal in the law firm of Borzilleri, Baker & Peis, with offices in the District of Columbia.

Respondent obtained Ms. Langlois' endorsement on the $20,000 check and deposited it into an account at Citizens Bank of Maryland. This was not an escrow or client trust account, but rather a checking account (variously referred to in the proceedings as an operating or "flush" account) which respondent used to pay business and personal expenses. He maintained a second account in the same bank, which was a savings account in the names of himself and his wife that earned higher interest than the checking account but on which the depositor could not write checks. Respondent had relied on the advice of bank officials in maintaining this "two-tiered" or tandem account structure; he testified that his practice was to transfer funds from the latter account to the former as needed to cover obligations. He did not seek the advice of any attorneys in regard to escrow accounts, even though his firm had both an operating account and an escrow account.

On January 10, 1989, after depositing the settlement check, respondent issued a check drawn on the operating account to Ms. Langlois in the amount of $11,206.34. After this check was presented and honored, and before respondent began reimbursing the medical care providers, the balance in his operating account was $9,902.51, including $2,427.00 held in trust to pay Ms. Langlois' medical bills. Over the next several months, however, respondent wrote a large number of checks from the account for family and personal expenses as well as for business-related expenses.[5] The result was that, after respondent distributed two checks totaling $1,200.00 to

[5] Merely by way of example, from January 11 to January 17, 1989, in addition to client- or firm-related checks, respondent wrote checks totaling $204.60 to Giant Food; two checks totaling $297.88 on behalf of his son, Jon Pels; and two other checks to Visa and Montgomery Ward, also apparently for personal

Dr. Launder, his checking account balance fell below the amounts needed to pay the balance of outstanding claims of Dr. Launder, Neurodiagnostic Center, and the hospital. As the Committee found, "[t]he account balance... fluctuated, so that on some days in February and March 1989, there were more funds in the Citizen/operating account than [r]espondent was obligated by his own accounting to pay out to Ms. Langlois' medical providers[,] while on other days there were not sufficient funds to do so." By late March 1989 the checking account was overdrawn, at a time when respondent was still holding funds for payment to Ms. Langlois' medical care providers.

In April 1989, respondent opened another non-escrow checking account, this time at Riggs Bank with a deposit of $322. No evidence was elicited explaining whether this was a successor to the two Citizens Bank accounts or an additional account. In October 1989, respondent drew a check on this account for $345.00 payable to Neurodiagnostic Center. The check was presented twice, first in November and then in December 1989, and was dishonored both times because of insufficient funds. At the point in December 1989 when the balance in the Riggs account was in overdraft, respondent was still required to hold funds to pay Dr. Launder and the hospital. In January 1990, one year after settlement of Ms. Langlois' personal injury claim, respondent issued a new check to the Neurodiagnostic Center that was presented and honored.

In December 1990, respondent opened his first escrow account, this time at Damascus Community Bank. Meanwhile, Ms. Langlois had begun receiving bills from Dr. Launder claiming an outstanding balance due.

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expenses. Later in January he wrote two checks totaling $1,350 to Villanova University on behalf of his son, as well as other checks for personal expenses. Checks in February included one for $1,000.00 to Villanova, $100.00 to Giant Food, and $225.00 to Montgomery Country Club. His numerous checks for personal matters in March included four totaling $364.19 to Giant Food; two totalling $325.00 to Jon Pels; and other checks to Montgomery Ward, Chrysler Credit, and Circuit City.

In June 1991, after Bar Counsel notified him of the receipt of a disciplinary complaint from Ms. Langlois, respondent issued one additional check to Dr. Launder for $140.00. Respondent had now paid Dr. Launder by way of three checks totaling $1,340, after advising his client that he was holding back $1,772.00 in settlement funds to pay Dr. Launder's outstanding bill. Respondent testified that the $432.00 difference was attributable to an irregularity in Dr. Launder's charges which respondent's staff had discovered. According to Ms. Langlois, however, she never received the benefit of this saving, and respondent never asked permission to use this money for any purpose other than to pay the bills listed in the distribution letter. The committee found that respondent retained $432.00 from the settlement funds which were never paid out or distributed. As to the $185.00 owed to Greater Beltsville Community Hospital, the Committee found that respondent had produced no records documenting this payment, but that "in the absence of any evidence [adduced by Bar Counsel] to the contrary." the hospital bill had been paid.[6]

At various times between August 1986 and August 1989, respondent had advised Ms. Langlois concerning her medical discharge from the Navy, which resulted from injuries she sustained in the motor vehicle accident. When he asked her to sign a retainer for his services related to the Naval Board, however, she refused, stating that she had done most of the preparation herself. Respondent nonetheless testified that his unreimbursed expenses for these and yet other services on Ms. Langlois' behalf entitled him to the difference between the $1,772 held to pay Dr. Launder and the $1,340 paid. As the Committee found, however, respondent could produce neither a retainer agreement nor a "statement or invoice for these services[ ] or out-of-pocket disbursements incurred in connection therewith." The Board similarly found that respondent "produced no exhibits showing that the savings [7] had been properly accounted for and credited against any amounts that Ms. Langlois might owe him."

II.

On the basis of these facts, the Committee concluded that Bar Counsel had proved the charge of misappropriation by clear and convincing evidence:

> [Respondent's] Riggs account -- set up after, and apparently replacing the two-tier structure [of linked checking and savings accounts at Citizens] — was overdrawn before the medical bills were settled. At this point, a misappropriation occurred.

The Board saw the misappropriation as having begun earlier, concluding that

> when Respondent deposited Ms. Langlois' insurance funds into his [Citizens] flush account, and then proceeded to write several checks for unrelated expenditures from this "flush" account, and the funds in the account fell below what was owed the client, Respondent committed misappropriation.

Moreover, "even if [r]espondent were correct " that the two Citizens Bank accounts "must be considered together," the Board concluded that

> misappropriation occurred when the bank dishon-

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6 The Board was skeptical of this finding, noting that respondent's "proof that the payment was made 'is that [in respondent's words] we never got any dunning notices or any billings from them."

7 Respondent testified, and neither the Committee nor the Board disputed, that the reduced total amount paid Dr. Launder resulted from irregularities in the billing that respondent or his staff had discovered on Ms. Langlois' behalf.

> ored Respondent's $345 check drawn on the Riggs account many months later. The record contains no evidence that Respondent contemporaneously held thousands of dollars in another account after he closed his linked savings and flush accounts.

As to the remaining charges, the Committee found that respondent had violated the record-keeping requirement of DR 9-103 (B)(3) and Rule 1.15 (a):

> Respondent was unable to document his payment of $185 to the Greater Beltsville Hospital. This alone constitutes a violation of DR 9-103 (B)(3) and Rule 1.15 (a). More importantly, however, the record before the Committee demonstrates Respondent's complete inability to account for the flow of funds that were received on Ms. Langlois' behalf.

The Board concluded that the lack of documentation of the hospital payment alone was sufficient to establish violation of these rules. Noting respondent's testimony about the hospital's failure to assert nonpayment, the Board determined that "[a]n absence of dunning letters does not constitute the maintenance of proper records."

Further, the Committee found that

> Respondent did not --- because he could not -- render a proper accounting to his client [8] of: (i) the actual disbursement of client funds to be made in connection with the personal injury matter; or (ii) his actual disbursement of his client funds held for payment to the client's medical providers.

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[8] "[T]he entire record indicates that [r]espondent's accounting records and procedures were so hopelessly inadequate that he may have been incapable of rendering an accounting."

The Board agreed that "[r]espondent's failure to provide an accounting stems from his failure to render an accounting for the $432 savings resulting from the negotiations with Dr. Launder."

> While Respondent contends that he is entitled to any amount saved on Dr. Launder's bill as an offset against out-of-pocket expenses incurred on Ms. Langlois' behalf, Respondent admits that he never provided her with a bill reflecting these disbursements much less advising her that he was taking funds held in trust to pay these alleged costs. While the Board acknowledges that Respondent seems to have incurred significant out-of-pocket expenses, it is not clear from the record or the testimony that Ms. Langlois was aware of the amount of these expenses or of the fact that these expenses were to be taken from the funds held in trust. Ms. Langlois cannot request an accounting of a transaction of which she was unaware.

Relatedly, the Committee found that respondent failed to "promptly deliver to the client" funds she was entitled to receive, Rule 1.15 (b), when he kept the $432 that had been set aside to pay Dr. Launder. Both the Committee and the Board rejected respondent's claim that he was entitled to keep this money because of his efforts on Ms. Langlois' behalf in the Naval medical discharge matter. The Committee found "inexplicable" respondent's

> failure to notify Ms. Langlois in writing that : (i) he revised the arrangements with her medical providers; (ii) he was billing her for certain additional disbursements in connection with another matter; and (iii) he intended to apply the unexpended trust funds to his benefit.

At bottom, the Committee found, "[r]espondent and his client did not agree on how to distribute the funds remaining in trust." Yet instead of leaving the funds in trust and suggesting means to resolve the dispute, [9] "[r]espondent resorted to self-help." The Board, while acknowledging that the record supported respondent's claim of reimbursable expenses and of "gratuitous benefits [he] conferred on Ms. Langlois," agreed that under the January 9 distribution letter respondent may have been able "to demand payment from his client for expenses in excess of $300, but he was not entitled to simply take the $432 with no explanation."

Turning to the issue of sanctions, the Committee recognized the severe consequences under *Addams, supra*, of a finding that respondent's misappropriation of client funds resulted from more than simple negligence. It concluded, nevertheless, that his misappropriation "was at least the result of the reckless handling of client funds." His total conduct which justified this finding, the Committee explained, included the facts that

---Respondent deposited the settlement funds not in a trust account but an account used both for business operations and for personal expenses;

---Respondent had no cogent explanation for the movement of his business accounts to other banks nor did he demonstrate any efforts to trace his client's funds into or out of those accounts.

---Respondent did not *promptly* pay his client's medical providers but did so sporadically over a 30-month period (and in so delaying subjected his client to the harassment of one doctor's bill collectors);

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[9] See comment [3] to Rule 1.15 ("The disputed portion of the funds should be kept in trust and the lawyer should suggest means for prompt resolution of the dispute.....").

---Respondent never accounted to his client for the savings he negotiatied with one of the medical providers;

---Respondent failed to accurately and definitively account for the expenses he claims to have offset with his client's funds; and

---Respondent made no effort to account to his client for said offset. [Emphasis in original.]

Besides recommending disbarment, the Committee concluded that respondent should be ordered to repay Ms. Langlois the $432. The Board majority agreed that respondent's misappropriation entailed more than mere negligence, and that *Addams* therefore requires his disbarment.

III.

The primary issues before this court are whether respondent committed misappropriation and, if so, whether his conduct was blameworthy enough to require disbarment under *Addams*. Although respondent also disputes the evidentiary sufficiency for the Committee's findings (concurred in by the Board) as to his failure to keep records, account for client funds, and deliver client or third party funds, these violations are ultimately significant because they formed the circumstances surrounding the misappropriation and were found by the Committee and Board to be decisive on the issue of culpability. We therefore treat respondent's claims regarding these violations in connection with the issue of sanction.

A. Misappropriation

As previously explained, this court must accept the Board 's (implicitly the Committee's) findings of fact unless they are unsupported by substantial evidence of record. *See In re Cooper*, 591 A.2d 1292,1294(D.C. 1991). Whether a determination that there has been misappropriation is a "finding of fact" or instead a legal conclusion (a

determination of "ultimate fact")[10] need not detain us, because the underlying facts found by the Board are firmly supported by the record and establish misappropriation clearly and convincingly.

> Misappropriation is defined as "any unauthorized use of client's funds entrusted to [the attorney], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom."

Id. at 1295 (quoting *In re Harrison*, 461 A.2d 1034, 1036 (D.C. 1983) (further citations omitted). "Improper intent is not an essential element of misappropriation." *Id.* indeed, when client funds are deposited

> into an attorney's operating account...misappropriation occurs when the balance in that account falls below the amount due to the client. Misappropriation in such situations is essentially a *per se* offense.....

Micheel, 610 A.2d at 233 (internal citation omitted); *see also In re Hessler*, 549 A.2d 700 (D.C. 1988). *In Hessler*, the court warned against "the totally improper action of placing a client's funds in the attorney's own account, " 549 A.2d at 701, an action that creates " 'the danger in all cases that such commingling will result in the loss of the client's money.' " *Id*, at 702 (quoting *clark v. State Bar*, 39 Cal. 2d 161, 168, 246 P.2d 1,5 (1952)). As long ago as *In re Hines*, 482 A.2d 378 (D.C. 1984), therefore, the court "put the Bar on notice that henceforth disbarment would be the usual santion for misappropriation not involving simple negligence." *Addams*, 579 A.2d at 196.

The Committee found that "by late March 1989, the Citizens/operating account was overdrawn" at a time when "[r]espondent was still holding funds for payment to Ms.

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[10] *Cf. In re Micheel*, 610 A.2d at 235 (determination that misappropriation was the result of simple negligence "was a determination of 'ultimate fact' – *i.e.*, a conclusion of law").

Langlois' medical providers." It was this account into which respondent had deposited the settlement check in January 1989, and on which he then drew numerous checks over the next several months to pay personal and business expenses unrelated to payment of his client's medical care providers. On March 13, and again on March 20, the operating account fell to a balance below that required to satisfy the third party claims. At this point, respondent had committed misappropriation.

We reject respondent's argument that because he simultaneously held thousands of dollars in the companion savings account, misappropriation did not occur when the operating account fell below the required balance. That argument is essentially no different than the one rejected in *In re Burton*, 472 A.2d 831 (D.C.), *cert. denied*, 469 U.S. 1071 (1984), in which the attorney asserted that by maintaining "sufficient funds [other than in a trust account] to satisfy the requirement of the trust," he complied with the duty to segregate client funds. *Id.* at 838. In adopting the Board's reasoning, we implicitly agreed with its conclusion that "even if respondent did have sufficient cash on-hand to cover the shortages, it would not excuse his breach of the trust or his unauthorized use of trust funds." *Id.* We also agreed that the "breach of the trust was [not] cured when he reimbursed the trust account," for "[r]estitution is not a defense to the charge of having misappropriated trust funds. *Id. In Harrison, supra*, similarly, we rejected the argument that misappropriation was not shown because, *inter alia*, the dishonoring of the attorney's check to the client " was in violation of an oral agreement with the bank to extend instant credit to cover all checks." 461 A.2d at 1035.

Whether Respondent's operating account held funds enough to pay Ms. Langlois' outstanding bills hinged entirely upon whether or not he transferred money to it from his (and his wife's) savings account. His explanation for having failed to make the transfers during March -- his frequent absences from the office on business -- merely underscores the risk to which he had exposed the client

funds by not escrowing them. In short, a trust account is a trust account, not one dependent on discretionary infusions of money from another source. Nor is it significant that, in establishing the "two-tiered" account structure, respondent had followed the advice of bank officials. Respondent's good faith or not --his benign intent-- is no more a defense to misappropriation than is "[i]mproper intent....an element" of that misconduct. *Harrison*, 461 A.2d at 1036. Moreover, our decisions at least since *Hessler* make such reliance on the advice of third persons (here presumably non-lawyers) in commingling client and personal funds grossly unreasonable.

Even if no misappropriation had occurred in March 1989, both the Committee and the Board found that it took place when respondent opened a Riggs Bank account in April 1989, and drew a check for $345 to Neurodiagnostic Center that was presented twice -- in November and December 1989 -- and dishonored each time. Respondent argues that this could not constitute misappropriation because it was not shown that he had moved the settlement proceeds to this account; for all that appears, he may still have held them in the Citizens checking account, which was not shown to contain insufficient money to cover Langlois' remaining bills during November and December. This argument is sleight-of-hand. The Citizens checking account originally holding the settlement proceeds had twice dropped below the necessary balance by April; respondent then twice attempted to pay a Langlois bill from the newly opened Riggs account, which was itself in overdraft. These circumstances, including respondent's own action implicitly identifying the Riggs account as the successor depository of the settlement funds, relieved Bar Counsel of any duty to trace the movement of client funds from one account to the other. Respondent was free to rebut the inference from his action that the Riggs account had replaced the Citizens accounts that putatively held the client funds in trust, but he

failed to do so.[11] ***In re Gilchrist,*** 488 A.2d 1354, 1357 (D.C. 1985); *see also In re Thompson,* 579 A.2d 218, 223 (D.C. 1990) (attorney's "inadequate or non-existent explanation for use of a client's funds" is "circumstantial evidence which the Board may consider.... in determining whether Bar Counsel has proven dishonesty"). Thus, even if maintenance of the two Citizens accounts in tandem could satisfy respondent's duty to preserve the inviolacy of client funds, the Board correctly concluded that misappropriation occurred when the Riggs check was twice dishonored, because there was no evidence that respondent held money in another account sufficient to cover his client's remaining obligations. Not until January 15, 1990, five weeks after the December check to Neurodiagnostic Center bounced, did respondent pay the $345 bill.

B.

We turn to the issue of proper sanction for the misappropriation. Bar Counsel states initially that the absence of a Board majority for a single recommended sanction makes inapplicable D.C.Bar R. XI, s9 (g), which requires the court to "adopt the recommended disposition.... unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted." We shall assume this is so even though the recommendation of three majority members for a disbarment stayed as to all but three months reflects a plea for relaxation of the rule of *Addams, supra,* since otherwise these members "would [also] be constrained to recommend disbarment."[12]

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[11] Even in his reply brief he asserts only that the Citizens savings account was closed on August 16, 1989 (its contents transferred to the Citizens checking account), that the Citizens checking account "was still in existence as of August 19, 1989," and that "the record is thereafter silent as to the status" of the account.

[12] *See* Separate Opinion of Board member Donnenfeld, at 2.

At least since *Addams*, "there is a presumption of disbarment in all cases involving misappropriation resulting from more than simple negligence." *Micheel*, 610 A.2d at 233. We agree with the conclusion of the Committee and the Board that respondent's misconduct entailed more than simple negligence. Viewed in its totality, his conduct was reckless. Essentially three considerations led the Committee and the Board, and lead us in turn, to the conclusion.

First, respondent's indiscriminate mingling of personal and client funds took place over nearly a year, involved the drawing of a great any personal and unrelated business checks on teh operating account into which Langlois' settlement proceeds had been deposited, and resulted in not just a repeated insufficiency of funds in the account to cover the client's obligations, but a repeated overdraft condition of both that account and what was inferentially is successor (the Riggs account), and the repeated dishonoring of checks to one of Langlois' medical care providers. Respondent's reliance on the two-tiered banking structure at Citizens was objectively unreasonable, and his explanations for its failure as well as for overdraft condition of the Riggs account (as to the latter, respondent cited "unauthorized third-party withdrawals") were completely unpersuasive. Respondent's commingling of client and personal funds in his business account was negligent to begin with, but his failure to recognize after March of 1989 (when the account fell into overdraft) the danger to which he had exposed the trust funds, instead perpetuating the failure to segregate them in the Riggs account, was reckless.

Second, respondent's conduct, as the Committee and Board both found, was marked by a pervasive failrure to maintain contemporaneous records accounting for the flow or disposition of client funds either within his "two-tiered" Citizens account or into the Riggs account. This was a partial basis for the Board's finding of an independent

violation of DR 9-103 (B)(3) and Rule 1.15 (a), which we accept. Respondent's claim that he had no due process notice that the discipline authorities would rely on his deficient recordkeeping except as to a single obligation -- the $185 owed Greater Laurel Beltsville Hospital ---is without merit. Bar Counsel's lead charge that respondent misappropriated client money by commingling it with, and using it as, his personal funds informed him adequately that his ability to "trace" or document the use of trust funds not escrowed would be at issue. *See Hessler*, 549 A.2d at 702 & n.9 (commingling ban designed to permit "tracing [of] the [trust] property:); *Thompson*, 579 A.2d at 223 ("adequacy of attorney's explanation for use of a client's funds" in case charging misappropriation important given "the acute difficulty" of "'tracing virtually untraceable funds' when the attorney had kept no record of disbursements") The Committee was justified in considering respondent's "complete inability to account for the flow of funds that were received on Ms. Langlois' behalf"[13] as an aggravating circumstance that raised his conduct beyond the level of mere negligence.

Third, the Committee and Board found that, besides the *per se* act of misappropriating funds needed to pay the client's bills, respondent failed to account for or to deliver to Ms. Langlois the balance of $432 remaining after the bills had been paid, thus independently violating DR 9-103 (B)(3) and Rule 1.15 (b). Respondent's defense was that this residue, which resulted from his efforts to get Dr. Launder- to reduce his charges, in fact belonged to respondent as an offset against out-of-pocket expenses he incurred on Ms. Langlois' behalf in the personal injury and Naval discharge cases as well as in other legal matters. He argued that the retainer agreement informed Langlois that costs were not included in his fee and that the January 9, 1989 distribution letter made clear that "Administrative and

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13 "How, when and in what amounts Ms. Langlois' funds were moved between these accounts," the Committee concluded, "is impossible to determine."

Miscellaneous Expenses" were "[a]pproximate" and might exceed the $300 of his fee and $500 in administrative expenses he was waiving. In this court, in addition to arguing that the Board "disregarded his asserted contract right to recover unreimbursed client expenses," respondent asserts that, at a minimum, he retained the $432 "pursuant to a truly held, albeit inaccurate, understanding [of his right that] involved..... only simple negligence or its equivalent." *In re Cooper*, 591 A.2d 1292, 1297-98 (D.C. 1991) (*Cooper I*) (internal quotation marks omitted); *see also In re Cooper*, 613 A.2d 938 (D.C. 1992)(*Cooper II*).

The Board, contrary to respondent's criticism, dealt painstakingly with his claim of contractual entitlement to the remaining funds. It reasoned as follows:

> Respondent claims entitlement to the amount saved on Dr. Launder's bill as an offset to reimbursable expenses incurred on Ms. Langlois' behalf. The Board notes that the record contains evidence both supporting Respondent's claim of reimbursable expenses and demonstrating gratuitous benefits conferred on Ms. Langlois. Although Ms. Langlois believed that she was under no obligation to pay disbursements, for example, the language of the retainer agreement appears to have obligated Ms. Langlois to do so. The retainer states that Ms. Langlois "agrees to pay, in addition to Attorney's fees, all reasonable and necessary costs as incurred in this matter." Furthermore, when Respondent accounted for the distribution of the $20,000 of insurance funds in the distribution letter, he obligated himself to pay $300 more in outstanding expenses than the funds he reserved for that purpose. Respondent also advised Ms. Langlois on a number of other matters at no expense to her. In fact, on one of these matters, Ms. Langlois received a recovery of $2000 with no deductions for Respondent's costs.

> Regardless of the benefits to Ms. Langlois, however, the Board feels compelled to adopt the Hearing Committee's finding of a failure to deliver funds to the client. While Respondent may have inadvertently over-obligated himself due to his generous calculations in the distribution letter, Respondent agreed to pay out certain medical providers, and he was obliged to fulfill those obligations. In light of Respondent's admission that he never provided Ms. Langlois with any sufficient accounting of his expenses or informed her of his intent to retain any savings resulting from the negotiations with Dr. Launder, the Board concurs with the Hearing Committee's conclusion that Respondent resorted to self-help. In the face of a specific agreement, the disbursement letter, limiting his fees, the excess $432 did not belong to Respondent but to his client. He may have been able under his interpretation of the disbursement letter to demand payment from his client for expenses in excess of $300, but he was not entitled to simply take the $432 with no explanation.

We adopt this reasoning. We further reject respondent's argument that his objective good faith -- his reasonable but erroneous belief that he was entitled to the balance of funds -- reduced his culpability to simple negligence. In *Cooper II*, the court sustained a determination by the Board that an attorney's "truly held, albeit inaccurate, understanding " of his right to apply client funds to earned attorney's fees was the "equivalent" of simple negligence, 613 A.2d at 939, in an exceptional case involving a family representation "characterized by marital discord, revenge, and family feuding." *Cooper I*, 591 A.2d at 1295 n.4. *See also Cooper II, 613 A.2d at 939 ("[T]*he Board in effect considered that [the attorney's] failure to understand the true state of his authority in this family dealing involved simple negligence or its equivalent....."). The Board

reached no such conclusion in the present case; respondent could assert no similar confusion of the dual roles of attorney and family member in extenuation of his fault. Moreover, respondent's failure to deliver the $432 was linked inseparably to his failure to keep records [14] and, most importantly, his failure to escrow the client funds from the beginning.[15] In *Micheel, supra,* this court sustained the Board's conclusion of recklessness in similar circumstances, where "Micheel made no attempt to keep track of his client's funds, but indiscriminately wrote checks on the account at a time when he knew or should have known that the account was overdrawn." 610 A.2d at 236. The aggravation of violations in this case makes it much closer to *Micheel* than to *Cooper.*

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For the reasons stated, therefore, the Committee and Board correctly determined that respondent's conduct -- including the key acts of misappropriation -- was caused by more than simple negligence. It follows that respondent must be disbarred, because the mitigating factors cited to us (his relative inexperience in client representation of this kind, [16] the lack of ultimate disadvantage to the client, [17]

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[14] The committee was "particularly troubled by the absence of both contemporaneous accounting records and a bill concerning the disbursements allegedly made in connection with [r]espondent's representation of Ms. Langlois in the medical discharge matter."

[15] In that regard the case differs significantly from In re Choroszej, 624 A.2d 434 (D.C. 1992), in which the attorney deposited and maintained the trust funds in his client trust account and disbursed them properly, but later wrote checks from the account for personal expenses in the "honest, but erroneous, belief" that the only remaining creditor had been paid, so that only funds to which he was entitled as legal fees remained in the account. Id. at 435-36.

[16] Respondent had retired from the Department of Justice in 1986 after some 25 years of government service. Prior to this case, he had had no experience with personal injury representation.

and the comparitively small dollar amounts involved) are not of the extraordinary kind that can overcome "the strong presumption of disbarment" that pertains after *Addams*. *See Micheel*, 610 A.2d at 237 n.14. *Addams* also, in our view, leaves this division no authority to "stay" the disbarment (as three Board members have recommended) in a case reflecting none of the unusual *Kersey*-type mitigating factors. See note 1, *supra*. Moreover, we agree with the comment of two Board members that a stay of disbarment in favor of suspension plus probation would be "simply a way of paying lip service to the ...rule [of *Addams*]. If the door is opened to allow exceptions to the ...rule that non-negligent misappropriation mandates disbarment, the rule becomes meaningless."[18] The further comment of these Board members is also noteworthy:

> When it adopted [the *Addams*] approach, the Court must have been aware that there would be sympathetic cases like this one where the results would be harsh and even unjust. That is the inevitable result of such rules. The Board does not do the Court a service by trying to mitigate this result. First, we weaken the rule by creating exceptions where the Court has said there should be none. Second, we shield the Court from facing the unpleasant consequences of its decisions. Third, we distort the logic of the law and create precedent that may result in unknown and perhaps unfortunate consequences in other cases. Our job is to follow the Court's decisions.[19]

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[17] Since respondent "waived collection of some funds he had been entitled to receive,...it can be said that, overall, the client was not significantly disadvantaged nor ...the attorney unjustly enriched by his 'self-help.'" Separate Opinion of Board member Donnenfeld, at 1.

[18] Separate Opinion of Board Member Fox, at 2-3.

[19] *Id.* at 3-4.

Individual members of this division also believe the result *Addams* dictates in this case is a harsh one. On the other hand, as the quoted comment acknowledges, in *Addams* the court weighed the concern of seemingly unjust application of a categorical sanction to particular cases against "our concern ... that there not be an erosion of public confidence in the integrity of the bar. Simply put, where client funds are involved, a more stringent rule is appropriate." *Addams*, 579 A.2d at 198. Whether the paramount goal of deterrence that drove the decision in *Addams* can be achieved by lesser, more case-individual sanctions for misappropriation is an issue the full court is always free to revisit -- though with the attendant risk of loss of predictability in our exercise of this most critical feature of our regulatory supervision. The division's obligation in this case, in any event, is clear.

It is ORDERED that respondent, Kenneth A. Pels, shall be disbarred from the practice of law in the District of Columbia, effective thirty days from the date of this opinion. It is further ORDERED that respondent shall make restitution to Elizabeth Langlois in the amount of $432. *See* Rule XI, s3 (b); *In re Solomon*, 599 A.2d 799 (D.C. 1991).

APPENDIX B-DENIAL OF REHEARING EN BANC

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 93-BG-1395 Dec. 12, 1995

In The Matter of
Kenneth Pels, Esquire
A Member of the Bar of the
District of Columbia
Court of Appeals BDN: 228-91

BEFORE: Wagner, Chief Judge; Ferren, Terry Steadman, Schwelb, *Farrell, *King, Ruiz and Reid, Associate Judges; and *Gallagher Senior Judge.

ORDER

On consideration of the respondent's petition for rehearing or rehearing en banc, it is

ORDERED by the merits division that the petition for rehearing is denied; and it appearing that the majority of the judges of this court has voted to deny the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

CHIEF JUDGE WAGNER AND ASSOCIATE JUDGE SCHWELB would GRANT the petition for REHEARING EN BANC.

APPENDIX C-REPORT AND RECOMMENDATIONS OF THE
BOARD OF PROFESSIONAL RESPONSIBILITY

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD OF PROFESSIONAL RESPONSIBILITY
In the matter of:
Kenneth A. Pels, Bar Docket No. 228-91
Respondent
REPORT AND RECOMMENDATIONS OF THE
BOARD ON PROFESSIONAL RESPONSIBILITY

This case arises out of Respondent's mishandling of client funds paid in settlement of a personal injury case. Bar Counsel alleged the following violations: DR 9-103(A) (commingling); DR 9-103(A) (misappropriation); DR 9-103 (B)(3) and Rule 1.15(a) (failure to maintain records and failure to render accounts to a client); and Rule 1.15(b) (failure to deliver promptly client funds). This matter was heard by Hearing Committee Number Three on August 20 and 21, 1992. Respondent did not dispute the commingling charge. The Hearing Committee concluded that Respondent had commingled his client's funds, had failed to account for client funds or to maintain records of those funds, had failed to deliver client funds, and had recklessly misappropriated client funds. The Hearing Committee recommended that Respondent be ordered to pay $432 restitution to his former client and recommended Respondent's disbarment. In a separate dissenting opinion, Committee Member Van Gelder found only negligent misappropriation and recommended a one-year suspension.

There are three separate opinions of the Board filed herewith. Two opinions, one authored by Chair Donnenfeld and joined in by Members Christensen and Howard and the other authored by Vice Chair Fox and joined in by Member Williams, adopt the findings and conclusions of the Hearing

Committee. The Fox opinion recommends that Respondent be disbarred. The Donnenfeld opinion recommends that Respondent be disbarred, that the disbarment be stayed but for a three-month suspension, and that Respondent placed on probation for three years after he resumes the practice of law. Member McKay writes a separate dissenting opinion, joined by Members Cohen, Zumas and Hart, in which he disagrees with the Hearing Committee's conclusion that Respondent's misappropriation was of the type that warrants disbarment, and recommends that Respondent be suspended for six months.

I. BACKGROUND

Respondent's former client Elizabeth Young Langlois had been involved in a traffic accident on August 26 or 27, 1986. Tr. I at 55. 1/ Through Respondent's representation, Ms. Langlois accepted a $20,000 settlement. In a January 1989 distribution letter from Respondent to Ms. Langlois, Respondent allocated the $20,000 settlement. Tr. I at 63-4; BX 1(a).2/ This allocation specified funds retained by Respondent to pay a number of medical charges on Ms. Langlois' behalf; an amount for Respondent's fees; a sum for approximate administrative and miscellaneous expenses; and the amount due to Ms. Langlois. Respondent waived some of his fees and expenses. Tr. I at 64-66; BX 1(a). Ms. Langlois consented to the proposed distribution. Tr. I at 66.

1/ "Tr. I" designates the transcript for the proceedings held on August 20, 1992. "Tr. II" herein identifies the transcript for the August 21, 1992 hearing.

2/ "BX" designates Bar Counsel's exhibits. All references to "RX" will designate Respondent's exhibits.

Ms. Langlois testified that in April 1989 she began to receive bills from medical providers when Respondent was obligated to pay by the terms of the distribution letter. Tr. I at 67. Respondent informed Ms. Langlois that he was attempting to rectify the problem. Tr. I at 71. At the Hearing, Ms. Langlois stated she was aware that the amount due to one of the listed health care providers, Dr. Launder, had been reduced from the amount listed as owed on the distribution letter. Id. She had not received the benefit from this saving, and Respondent had never asked her permission to use this money for any purpose other than to pay the bills listed in the distribution letter. Id.

Ms. Langlois stated that Respondent assisted her in matters other than the insurance settlement from the traffic accident. Tr. I at 79, 83-85. These additional matters included advice and services rendered regarding Ms. Langlois' discharge hearing in front of the Naval Medical Discharge Board. Tr. I at 78-83. While the hearing before the Naval Board did not occur until August 1989, the case became active when Ms. Langlois entered the hospital following her traffic accident. Tr. I at 78-79. Ms. Langlois agreed that Respondent performed some services in relation to the Naval Board proceedings. Tr. I at 126. When Respondent asked Ms. Langlois to sign a retainer for his services related to the Naval Board, she refused, alleging that she had done most of the preparation herself. Tr. I at 81. Ms. Langlois further testified that as of January 1989, she did not understand that she would owe Respondent any money for his services in relation to the Naval Board proceedings. Tr. I at 117. Ms Langlois testified that "once the hearing came about" she was assigned a military lawyer, but prior to this appointment, it was her intention to be represented by respondent before the Naval Board. Tr. I at 81, 127.

In addition to the motor vehicle and Naval Board discharge matter, Ms. Langlois sought Respondent's legal advice on other matters. Tr. I at 83. Respondent rendered legal advice regarding three stolen motor vehicles. Id. Ms. Langlois also sought Respondent's advice with respect to a divorce. Tr. I at 84.

It was Ms. Langlois' understanding that the one-third contingent fee that she had agreed to pay in the retainer letter covered all of Respondent's work and costs as her attorney. Tr. I at 88 and 128; BX 12(g). Ms. Langlois admitted receipt of a letter in June 1989 in which Respondent alluded to outstanding costs on Ms. Langlois' account. Tr. I at 86; RX5. Because of her understanding that Respondent was to pay all expenses, Ms. Langlois considered the letter "a joke," and did not pay the bill. Tr. I at 89. Ms. Langlois further testified that while the distribution letter stated that "we will waive the recoverable cost incurred in this litigation" and that Respondent was "waiving $300 of the fee and $500 of the administrative cost, "she did not understand why any costs would need to be waived under the retainer agreement . Tr. I at 91-92; BX 1(a).

Respondent had been a practicing lawyer since 1962. Tr. I at 138; BX A. Respondent had a government career that lasted about 25 years. He was an Assistant Judge Advocate, and later a Staff Judge Advocate. He worked on government contract matters at General Dynamics. He was an Assistant Corporation Counsel for the District of Columbia, and was then employed in the Lands Division of the United States Department of Justice until he left to enter private practice for the first time in late 1986. He became associated with the law firm Borzilleri, Baker and Deamer. Tr. I at 138-144, 147-148, and 152-153.

While Mr. Baker and Mr. Deamer specialized in personal injury work, Respondent had no prior personal injury experience as a plaintiff's lawyer. Tr. I at 170; Tr. II at 37. Ms. Langlois' settlement funds were the first such funds that Respondent had ever handled. Tr. I at 226. Respondent also stated that although Mr. Baker was available for advice on client matters, but that they each worked out of different offices. Tr. II at 39 and 43.

In December 1988, Respondent opened two accounts in the same bank. One was a savings account that earned higher interest than a checking account, but on which depositer could not write checks. The other was a checking or flush account. Tr. I at 225. Presumably Respondent kept most of his money in the savings account to earn higher interest, transferring it to the "flush" account when he needed to write checks. Respondent said he relied upon the bank's advice in setting up this account arrangement and did not seek the advice of any attorneys regarding escrow accounts. Tr. I at 225; Tr. II at 105.

Respondent does not dispute that during March 1989 the "flush" account fell into overdraft, but he claims that at all relevant times the savings account held sufficient funds to cover all transactions. Tr. I at 232; Tr. II at 18. Respondent testified that he would have transferred money to prevent the overdraft but for the fact that, during the relevant period, he was traveling eighty to ninety percent of the time. Tr. II at 18. Respondent testified to writing checks for personal expenses from the "flush" account. Tr. II at 190.

Respondent testified that he became involved in the Langlois matter when one of the members of the firm asked him to visit Ms. Langlois in the hospital after her accident. Tr. I at 156. Respondent testified that Ms. Langlois signed the retainer at the time. Tr. I at 159; Tr. II at 126. Under Respondent's interpretation, costs were not a component of the retainer's s one-third contingent fee: Ms. Langlois was responsible for costs. Tr. I at 208-209.

Regarding the distribution letter, Respondent testified that the $500 waiver for administrative and miscellaneous expenses mentioned in the letter went towards expenses already incurred. Tr. I at 197-199. 3/ At the time the distribution letter was prepared, Respondent knew that incurred costs exceeded the $500 in costs that he had waived. Tr. I at 197. It was not Respondent's intent to waive all administrative and miscellaneous costs, but rather to be reimbursed for costs in excess of $500. Tr. II at 166. Respondent insisted that Ms. Langlois had been told that she owed Respondent for incurred expenses exceeding the $500 waiver and that when Ms. Langlois received her settlement check, she owed Respondent additional sums. Tr. I at 198; Tr. II at 167.

Respondent testified that the amount for which Ms. Langlois was obligated to reimburse him had not been included in the letter because he was "being a good guy and because we didn't press her" and that the larger settlement check was "to help her out." Tr. I at 199, 189. Respondent further testified that at or after the distribution of the proceeds to Ms. Langlois, he never advised her in writing of a specific sum for out-of-pocket expenses for which she was allegedly obligated to reimburse him, although Respondent insisted that "it was discussed on a number of occasions." Tr. II at 170.

When questioned about Dr. Launder's bill, Respondent testified that the $1772 figure in the distribution letter listed as the amount payable to Dr. Launder on Ms. Langlois' behalf had been based on a phone call to Dr. Launder's office. Tr. I at 209. Respondent alleged that the $1772

figure was incorrect and that he was not in fact obligated to pay Dr. Launder $1772 on Ms. Langlois' behalf. Tr. I at 212. Respondent testified that his staff first paid Dr. Launder $900 and that subsequently he or his staff discovered irregular charges on the bill. Tr. I at 212-213. Several weeks later, Respondent paid $300 on the same account. Tr. II at 61. Respondent testified that he did not immediately press the erroneous billing issue with Dr. Launder because of a continuing need to deal with Dr. Launder on the Naval Board matter. Tr. II at 122. Respondent stated that although he was confident that he had already met his full obligation to his client. He continued to dispute the bill with Dr. Launder "simply to assist Miss Langlois." Tr. I at 237-238. Respondent testified that he paid an additional $140 to Dr. Launder "just to get rid of it and in our interest to protect or assist the client," even though he felt he had already overpaid the account. Tr. II at 123, 125.

As to the difference between the $1772 listed on the distribution letter and the money that Respondent actually paid to Dr. Launder, Respondent insisted that he was entitled to any savings because of the amount of unreimbursed out-of-pocket expenses he had incurred on Ms. Langlois' behalf. Tr. II at 172-173. Respondent produced no exhibits showing that the savings had been properly accounted for and credited against any amounts that Ms. Langlois might owe him. Tr. II at 100.

Respondent did not dispute the debt of $185 listed on the distribution letter as owed to Greater Laurel Beltsville Hospital ("Greater Laurel"), and stated that he had paid Greater Laurel that amount. Tr. II at 66. Respondent was, however, unable to produce any documentary evidence of payment of this bill. Tr. II at 68. He claimed that his proof that the payment was made "is that we never got any dunning notices or any billings from them." Tr. II at 75.

Respondent testified that before he closed his "flush" and savings accounts, he opened a comparable checking account at Riggs National Bank of Washington ("Riggs

account"). Tr. I at 250. Respondent admitted that a check he wrote from the Riggs account for $345 on Ms. Langlois' behalf had been dishonored by the bank. Tr. I at 252. Respondent explained that an insurance company was making unauthorized deductions from the Riggs account, causing the balance to fall below what he had believed it to be. Tr. I at 252-53.

On the Naval Board discharge matter, Respondent testified that he assisted Ms. Langlois because he felt sorry for her and because she sought his assistance. Tr. I at 177. Respondent testified that he waived all attorney's fees but had incurred reimbursable expenses on the discharge matter. Tr. I at 180-182. The discharge matter was subject of ongoing discussions between Respondent and Ms. Langlois throughout their relationship. Tr. I at 185. In addition to the accident settlement and discharge matter, Respondent testified that Ms. Langlois sought his assistance on other matters, including advice on recovery of stolen vehicles, repair of stolen vehicles, and divorce law. Respondent also recovered for Ms. Langlois almost $2000 for loss and property damage and made no deductions for Respondent's costs or fees. Tr. II at 10-14.

II. DISCUSSION

Respondent was charged with four violations of three provisions of the Code of Professional Responsibility and two Rules of Professional Conduct. Because the charged violations occurred between 1989 and 1991, 4/ the Hearing Committee considered both the Rules and the Code. Report at 14.

A. DR 9-103(A): Commingling

The Hearing Committee concluded that Respondent's actions in 1989 constituted commingling of client funds in violation of DR 9-103 (A). Report at 14. Respondent admits this violation. Resp. Post-Hearing Brief at 1; Tr. I at 33; Amended Ans. Para. 27; Report at 13.

DR 9-103(A) requires as attorney to deposit "<a>11 funds of clients paid to a lawyer . . . other than advances for costs and expenses,.... in one or more identifiable bank

accounts... and no funds belonging to the lawyer or the law firm shall be deposited therein." Once the lawyer deposits client funds into the lawyer's operating account, commingling has occurred. See In re Gilchrist, 488 A.2d 1354 (D.C. 1985) (affirming the Board's finding of commingling upon a lawyer's deposit of client settlement funds into his personal bank account); In re Hessler, 549 A.2d 700, 701 (D.C. 1988) ("<t>he problem arises because of the totally improper action of placing a client's funds in the attorney's own account"); In re Micheel, 610 A.2d 231,233 (D.C. 1992) (depositing client funds into an attorney's operating account constitutes commingling).

Respondent testified that in January 1989, he deposited Ms. Langlois' $20,000 settlement check into his operating account. Tr. I at 227-30; Tr. II at 104-11. Respondent further testified that he had never previously handled client funds, and that he relied solely on the bank's advice as to the opening and operation of his accounts. Tr. II at 105-09. Commingling, however, is a per se offense, and the simple act of depositing the funds into Respondent's flush account violates the prohibition against commingling. See Hessler, 549 A.2d 701-703. The Board, therefore, agrees with the Hearing Committee that Respondent's actions in 1989 clearly constituted commingling of client funds.

B. DR 9-103 (B)(3) and Rule 1.15 (a): Failure to Maintain Complete Records

DR 9-103(B)(3) requires all lawyers to "maintain complete records of all funds . . . . of a client coming into <the> possession of a lawyer." Rule 1.15(a) states that lawyers must keep "<complete> records of such account funds." Based on Respondent's inability to document his payment of $185 to Greater Laurel, the Hearing Committee found a violation of DR 9-103(B)(3) and Rule 1.15(a). Report at 15.

The committee further concluded that the record "demonstrates Respondent's complete inability to account for the flow of funds that were received on Ms. Langlois' behalf." Id. The Committee maintained three bases for this

conclusion: (1) Respondent provided no explanation for his failure to use the law firm accounts instead of his own; (2) Respondent maintained accounts at a series of banks and failed to explain the relationship among the accounts or their use; and (3) Respondent could not produce any clear, contemporaneous accounting records to explain what happened to the funds deposited in trust for Ms. Langlois. Report at 15-16.

The Board affirms the Hearing Committee's conclusion that Respondent's inability to document his payment of $185 to Greater Laurel constituted a violation of both rules. Respondent stipulated that he could not produce any documentary basis proving payment of this bill. Tr. II at 69,75. Respondent further stated that his proof of when the payment was made "is that we never got any dunning notices or any billings from them." Id. An absence of dunning letters does not constitute the maintenance of proper records.

The Board also concurs with the Hearing Committee that DR 9-103(B)(3) and Rule 1.15(B) require lawyers to maintain contemporaneous documentary evidence to trace the flow of all escrow funds entrusted to them. Report at 16. See, e.g., In re Reed, 369 A.2d 686, 688 (Del. 1977) (affirming Censor Committee finding that a lawyer who did not keep records adequate to explain the flow of a client's escrow funds had violated the directive to preserve the identity of client funds); cf. In re Thompson, 579 A.2d 218, 220 n.6 (D.C. 1990) (quoting In re Herr , 125 A.2d 706,719 (N.J. 1956) (stating that "<o>nly by being able to show clearly each and every one of his transactions . . . can <the lawyer> insure himself of being above reproach") (further citations omitted). The Board affirms the Hearing Committee's finding that the clear and convincing evidence is that Respondent did not have adequate records to enable him to trace all escrow funds entrusted to him by Ms. Langlois. Report at 16. When asked about the savings

resulting from the adjustment on Dr. Launder's bill, for example, Respondent could not explain what had happened to the funds that were left over after the doctor reduced his bill. Tr. II at 97. Thus, the Board adopts the Hearing Committee's conclusion that Respondent violated the duty to maintain complete records.

C. DR 9-103 (B)(3)/Rule 1.15(b): Failure to Provide an Accounting

DR 9-103(B)(3) and Rule 1.15(b) require an attorney to render a full accounting to clients regarding client funds held in escrow upon request by the client. The Hearing Committee found that the clear and convincing evidence established Respondent's violation of this requirement because of his failure to render a proper accounting of both the actual disbursement of Ms. Langlois' funds made in connection with the personal injury matter and the actual disbursement of Ms. Langlois' funds held for payment to her medical providers. Report at 16-18.

Respondent's position is that while he concededly did not provide Ms. Langlois with an itemized statement of reimbursable expenses incurred on the client's behalf, the record contains no evidence that she ever requested such a statement. Resp. Post-Hearing Exceptions at 3. Furthermore, the record indicates that Ms. Langlois was kept somewhat informed by the amount of correspondence sent to her by Respondent. Tr. I at 111. In fact, at one point during her testimony, she admitted having "received so much stuff" from Respondent that she could not specifically answer a question. Id.

The Board believes that Respondent's failure to provide an accounting stems from his failure to render an accounting for the $432 savings resulting from the negotiations with Dr. Launder. While Respondent contends that he is entitled to any amount saved on Dr. Launder's bill offset against out-of-pocket expenses incurred on Ms. Langlois' behalf, Respondent admits that he never provided

her with a bill reflecting these disbursements much less advising her that he was taking funds held in trust to pay these alleged costs. Tr. II at 99-100, 172-173. While the Board acknowledges that Respondent seems to have incurred significant out-of-pocket expenses, it is not clear from the record or the testimony that Ms. Langlois was aware of the amount of these expenses or of the fact that these expenses were to be taken from the funds held in trust. Ms. Langlois cannot request an accounting of a transaction of which she is unaware. The Board, therefore, adopts the Hearing Committee's conclusions that Respondent violated DR 9-103(B)(3) and Rule 1.15(b).

D. Rule 1.15(b):Failure to Deliver Funds to the Client

Rule 1.15(b) requires a lawyer to "promptly deliver funds to the client.....any funds....that the client..... is entitled to receive...." The Hearing Committee found that Respondent violated this rule based on Respondent's retention of the amount saved by renegotiating Dr. Launder's bill. Report at 18-19. The Hearing Committtee recommended that Respondent be ordered to make restitution to Ms. Langlois in the amount of $432, the difference between the amount Respondent stated was due to Dr. Launder in the distribution letter and the amount that Respondent actually paid Dr. Launder on Ms. Langlois' behalf. Report at 23.

Respondent claims entitlement to the amount saved on Dr. Launder's bill as an offset to reimbursable expenses incurred on Ms. Langlois' behalf. Tr. II at 172-173. The Board notes that the record contains evidence both supporting Respondent's claim of reimbursable expenses and demonstrating gratuitous benefits conferred on Ms. Langlois. Although Ms. Langlois believed that she was under no obligation to pay disbursements, for example, the language of the retainer agreement appears to have obligated Ms. Langlois to do so. The retainer states that Ms. Langlois "agrees to pay, in addition to Attorney's fees, all reasonable and necessary costs as incurred in this

matter." BX 12(g). Furthermore, when Respondent accounted for the distribution of the $20,000 of insurance funds in the distribution letter, he obligated himself to pay $300 more in outstanding expenses than the funds he reserved for that purpose. Respondent also advised Ms. Langlois on a number of other matters at no expense to her. Tr. I at 78-85, 126; Tr.II at 10-14. In fact, on one of these matters, Ms. Langlois received a recovery of $2000 with no deductions for Respondent's costs. Tr. II at 14.

Regardless of the benefits to Ms. Langlois, however, the Board feels compelled to adopt the Hearing Committee's finding of a failure to deliver funds to the client. While Respondent may have inadvertently over-obligated himself due to his generous calculations in the distribution letter, Respondent agreed to pay out certain amounts on Ms. Langlois' behalf to certain medical providers, and he was obliged to fulfill those obligations. In light of Respondent's admission that he never provided Ms. Langlois with any sufficient accounting of his expenses or informed her of his intent to retain any savings resulting from the negotiations with Dr. Launder, the Board concurs with the Hearing Committee's conclusion that Respondent resorted to self-help. In the face of a specific agreement, the disbursement letter, limiting his fees, the excess $432 did not belong to Respondent but to his client. He may have been able under his interpretation of the disbursement letter to demand payment from his client for expenses in excess of $300, but he was not entitled to simply take the $432 with no explanation. Tr. II at 100, 172-73; Report at 19. The Board, therefore, adopts the Hearing Committee's conclusion that Respondent violated Rule 1.15(b).

E. DR 9-103(A): Misappropriation

The Hearing Committee found that Bar Counsel had proven by clear and convincing evidence Respondent's misappropriation of $432 in client funds in violation of DR 9-103(A). Report at 19. The Hearing Committee based its conclusion on five findings: (1) Respondent had commingled the $20,000 insurance settlement; (2)

Respondent was unable to trace the entire $20,000 after its deposit; (3) at various times Respondent's account balances fell below the amount Respondent was obligated to pay out on Ms. Langlois' behalf; (4) checks issued to Ms. Langlois' medical providers were dishonored for insufficient funds; and (5) Respondent admittedly exercised self-help to convert client funds to his benefit. Report at 19.

The Hearing Committee found that Respondent's misappropriation was the result of a reckless disregard for client funds. Report at 21. In its finding of recklessness, the Hearing Committee pointed to: (1) Respondent's failure to calculate the actual cost of his disbursements at the time he signed the distribution letter; (2) Respondent's reliance on a phone call to Dr. Launder's office rather than a written invoice for the amount stated as due in the distribution letter; (3) Respondent's deposit of the settlement funds in the "flush" account; (4) Respondent 's lack of a cogent explanation for the movement of his business accounts to other banks and his failure to trace his client's funds to these accounts; (5) Respondent's sporadic payments to Ms. Langlois' medical providers; (6) Respondent's failure to account to Ms. Langlois for the saving he negotiated with Dr. Launder; (7) Respondent's failure to account accurately and definitively for expenses he allegedly offset with Ms. Langlois' funds.

In reviewing the Hearing Committee's factual findings, or subsidiary findings of fact, the Board is obligated to uphold the findings if supported by substantial evidence of record. Board Rule 13.6; In re Smith, 403 A.2d 296, 302-03 (D.C. 1979); In re Micheel, 610 A.2d 231, 234-5 (D.C. 1992). To the Hearing Committee's ultimate findings of fact, or conclusions of law, however, the Board owes no such deference. Micheel, 610 A.2d at 234-235 (Hearing Committee's finding of negligent misappropriation was a determination of "ultimate fact" directly affecting the severity of the sanction and one to which the Board did not owe deference). Looking to the record here as a whole, the Board majority concludes that the factual findings of the Hearing Committee regarding Respondent's

misappropriation and recklessness are supported by substantial evidence.

In In re Harrison, 461 A.2d 1034 (D.C. 1983), which was followed in such cases as In re Buckley, 535 A.2d 863 (D.C. 1987), the Court adopted the New Jersey definition of "misappropriation," e.g., "any unauthorized use of client's funds entrusted to him, including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain therefrom." Harrison, 461 A.2d at 1036 (quoting In re Wilson, 409 A.2d 1153, 1155 n.1 (N.J. 1979). Under this rule, when Respondent deposited Ms. Langlois' insurance funds into his flush account, and then proceeded to write several checks for unrelated expenditures from the "flush" account, and the funds in the account fell below what was owed the client, Respondent committed misappropriation. Accord Micheel, 610 A.2d at 233 (stating that "misappropriation occurs when the balance in <the> account falls below the amount due the client").

There is another way to approach this matter, with the same result. When Respondent allocated Ms. Langlois' insurance proceeds in the distribution letter and deposited the proceeds in his "flush" account, he became obligated to pay the listed amounts from the account. Under Harrison, when Respondent's "flush" account went into overdraft before he had paid all amounts as listed on the letter, Respondent committed misappropriation.

Respondent argues that because he contemporaneously held thousands of dollars in the companion savings account, misappropriation did not occur when the "flush" account fell into overdraft because he says that both accounts must be considered together. But even if Respondent were correct, under Harrison misappropriation occurred when the bank dishonored Respondent's $345 check drawn on his Riggs account many months later. The record contains no evidence that Respondent contemporaneously held thousands of dollars in another account after he closed his linked savings and

flush accounts.

Given the Hearing Committee's factual findings, including Respondent's insufficient account balances, the dishonored checks, Respondent's attempted self-help, and Respondent's failure to account for his alleged offsets, the Board agrees with the Committee's conclusion that Respondent's misappropriation was reckless.

The Board forwards herewith three separate recommendations as to sanction. Member McKay dissents, finding the misappropriation resulted from no more than simple negligence or its equivalent, and recommends a six-month suspension.

BOARD OF PROFFESSIONAL RESPONSIBILITY

By_____
Charles R. Donnenfeld
Chair

Dated_____

All members of the Board concur in the Report and Recommendation except Mr. McKay, Mr. Cohen, Ms. Zumas, and Mr. Hart, who file a separate dissenting opinion. Mr. Donnenfeld files a separate opinion as to sanction, joined in by Ms. Christensen and Mr. Howard. Mr. Fox files a separate opinion as to sanction, joined in by Mr. Williams.

APPENDIX D-SEPARATE REPORT AND RECOMMENDATIONS OF THE BOARD OF PROFESSIONAL RESPONSIBILITY

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD OF PROFESSIONAL RESPONSIBILITY

In the matter of:

Kenneth A. Pels, Bar Docket No. 228-91

Respondent

SEPARATE OPINION OF MR. FOX
BOARD ON PROFESSIONAL RESPONSIBILITY

I recommend that the Court enter an order in this matter disbarring Respondent from the practice of law and ordering Respondent to pay $432 in restitution to his client, Ms. Langlois. I adopt the Hearing Committee's finding that Respondent's misappropriation resulted from recklessness and further adopt its recommendation that Respondent be disbarred and ordered to make restitution. As did the Hearing Committee majority, I believe that the rule set forth by the Court in In re Addams, 579 A.2d 190 (D.C. 1990) applies here.

In Addams, the Court held that "in virtually all cases of misappropriation, disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence." Id. at 191. Respondent's conduct is more than simple negligence.

Application of Addams to Respondent's situation yields a hard result. Respondent incurred significant, non-reimbursed costs on Ms. Langlois' behalf. Respondent provided his former client with a substantial amount of free legal services. Moreover, Respondent seems to have obligated himself in the distribution letter to pay expenses in excess of the amount he withheld from his client's distribution. But whatever obligations Respondent entered into in the disbursement letter, he was obliged to live up to them. The fact that he may have been overly generous to his client does not mean that he could unilaterally revoke the agreement about how funds were being disbursed, and appropriate money set aside for medical bills to his own

account. That appropriation was a misappropriation, and it was not the result of mere negligence. The Board is bound by the rule in Addams that anything other than simple negligence must result in disbarment. Accordingly, I recommend Respondent's disbarment.

In addition, I adopt the Hearing Committee's recommendation that Respondent be ordered to make restitution to Ms. Langlois of the $432.

My colleagues have searched for a way to evade the harsh results mandated by Addams. Mr. McKay would hold in the face of both the Hearing Committee's findings to the contrary and the undisputed facts about Respondent's handling to the contrary and the undisputed facts about Respondent's handling of his client's funds that this conduct was not reckless. I do not believe that a fair reading of the record can justify this conclusion, but however Respondent's conduct is characterized, it was more than simple negligence. I read Addams to say that if the misappropriation is more than simple negligence, even if it does not constitute recklessness, disbarment is mandated. Mr. Donnenfeld recommends that Respondent be disbarred but that the sanction be stayed, that he be suspended for three months and placed on probation for three years. But this is simply a way of paying lip service to the Court's rule. If the door is opened to allow exceptions to the Court's rule that non-negligent misappropriation mandates disbarment, the rule becomes meaningless. Moreover, I do not believe this is an appropriate case for probation. True, Respondent was clueless about how to handle client funds, but this matter has obviously educated him. I see nothing to suggest that he should be monitored further or that this case justifies the expenditures of scarce resources that a probationary sanction would entail.

I want to be clear, however, that I believe Mr. McKay's recommendation and Mr. Donnenfeld's recommendation would result in a more "just" result than my recommendation. I do not think that Respondent deserves to be disbarred. Were this Board free to rule de novo, in the absence of controlling authority, I would recommend a brief

suspension. But we are not. We must follow the Court's rulings even if we believe they are wrong and would lead to an unjust result. Before Addams was decided, the Court asked the Board for its views as to whether disbarment should be the (virtually) automatic sanction in cases of misappropriation. We urged a more flexible approach, but the Court rejected our advice. Presumably the Addams rule is designed to deter lawyers from treating client funds in other than the most conservative fashion. That is a laudable goal. The rule and the goal are weakened if there are exceptions.

When it adopted this approach, the Court must have been aware that there would be sympathetic cases like this one where the results would be harsh and even unjust. That is the inevitable result of such rules. The Board does not do the Court a service by trying to mitigate this result. First, we weaken the rule by creating exceptions where the Court has said there should be none. Second, we shield the Court from facing the unpleasant consequences of its decisions. Third, we distort the logic of the law and create precedent that may result in unknown and perhaps unfortunate consequences in other cases. Our job is to follow the Court's decisions. If the result is unjust, as I believe it is in this case, then it is up to the Court whether such an unjust result is a tolerable consequence of the goal of deterrence or whether Addams should be modified.

_____

Hamilton P. Fox, III
Vice Chair

Dated:_____

Member Williams joins in this separate opinion.

APPENDIX E-SEPARATE REPORT AND RECOMMENDATIONS OF THE BOARD OF PROFESSIONAL RESPONSIBILITY

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD OF PROFESSIONAL RESPONSIBILITY

In the Matter of:
Kenneth A. Pels, Bar Docket No. 228-91

Respondent

SEPARATE OPINION OF MR. DONNENFELD
BOARD ON PROFESSIONAL RESPONSIBILITY

This case involves a "first offense" by an attorney who -- though a member of the D.C. Bar for many years -- had only recently entered private practice. He got himself into trouble handling funds he received in settling a personal injury case. This was apparently his first representation of a plaintiff in a contingent fee personal injury matter. He comminglied funds; he failed properly to account to the client; and he took for himself approximately $500 that should have gone to the client.

An unusual feature of this case is that, in dealing with this same client, the attorney waived collection of some funds he had been entitled to receive. Therefore, it can be said that, overall, the client was not significantly disadvantaged nor was the attorney unjustly enriched by his "self-help." Nevertheless, as Mr. Fox points out in his separate opinion, the Court's precedents mandate a finding of "something more than negligent" misappropriation in this sort of case, and such a finding entails virtually an automatic sanction of disbarment. 1/

The Board and Hearing Committees have used considerable ingenuity in recent cases to cope with what operates, in effect, as a per se rule. In some situations, an attorney's alleged mistaken belief as to the propriety of the takings has saved the day for him. In other cases a recommendation of disbarment was averted by our finding

"something equivalent to negligent" misappropriation. See, e.g., In re Evans, 578 A.2d 1141 (D.C. 1990); and In re Hessler, 549 A.2d 700 (D.C. 1988). The dissenting member of the Hearing Committee in the instant case would protect Respondent under a finding of "negligence." However, I am not comfortable with stretching the concept of "negligent misappropriation" to cover a case such as this one, where the attorney's actions are admittedly intentional, rather than careless. Thus, I would be constrained to recommend disbarment, but I would not stop there.

In some of the Board's recent reports to the Court, we urge the Court to extend the use of Kersey-type sanctions beyond cases of substance abuse or mental illness. See, for example, the Board's recent Report in In re Spaulding, D.N. 338-91, issued on July 12, 1993, and cases cited therein. In those cases, because of particular curcumstances, we recommended that the attorney be suspended from practice, but asked that the suspension be held in abeyance while the attorney was placed on probation, with his professional affairs monitored. If this remedy is appropriate in the case of a recovering alcoholic or an addict being rehabilitated, I do not see why it should not be used in cases like that before us.

Judge Ferren observed in his recent concurring opinion in In re Mintz, ____a.2d____ (D.C. 1993), slip op.7, that "it seems to me that some of these probationary requirements would also be desirable in certain cases in which attorneys do not suffer from addictions or other illnesses." He recognized in Mintz that the probation provision set forth in Rule XI, Section 3(a)(7) is broad enough to cover its use in situations such as the instant case.[2/] The creative use of probation makes it possible to tailor the appropriate discipline to the circumstances of each case without doing violence to the "comparable sanction in comparable cases" requirement.

I am aware that in In re Tinsley, 582 A.2d 1192 (D.C. 1990), the Board listed several criteria that it felt should be met in order to impose supervised probation, one of which

was that the offense not be a serious one. These criteria had been announced earlier in In re O'Dea, B.D.N. 53-82, et al. (B.P.R. March 9, 1984). Bd.Rpt. 21-2 (July 31, 1989). In Tinsley, the Board concluded that the lawyer failed to satisfy the stated criteria because he exhibited no remorse and had a prior record of discipline after which his misconduct escalated. The misconduct involved six separate matters and fifteen ethical violations that were not "isolated instances of errors of judgement or innocent misunderstandings with clients." 582 A.2d at 1195.

The situation here is certainly different. In addition, it is almost ten years since the Board issued O'Dea . We now have more experience in determining appropriate sanctions and have been encouraged by both the McKay commission and the Court to be more flexible and innovative. Despite the seriousness of Respondent's misconduct in the present case, he has no disciplinary record and the misconduct here seems to have been an isolated incident. Respondent has exhibited an understanding that what he did was wrong and is as repentant as he can be consistent with the defense he is asserting. In Kersey-type cases, even where the offenses are most serious, the otherwise appropriate sanction (usually long-term suspension or disbarment) is imposed, but totally stayed, and the attorney is allowed to continue practicing while probation with monitors is in place. I think an appropriate sanction in the present case would be to order Respondent's disbarment in accordance with our non-negligent misappropriation precedents, but to stay all but three months of this suspension -- after which period Respondent will be able to practice on a probationary basis subject to practice and financial monitors.

The purposes of the attorney discipline -- to protect the public, the courts and the integrity of the legal profession -- would be served in this case by a stayed disbarment and probation. See In re Reback, 513 A.2d 226, 231 (D.C. 1986) (en banc) . In addition, the total sanction will fairly address the true nature of Respondent's misconduct and the surrounding circumstances. The public will be protected

because Respondent's post-suspension practice and finances will be monitored. Any transgressions will be immediately reported to the Bar Counsel, to be prosecuted and adjudicated on an expedited basis. The disbarment sanction, which will literally hang over Respondent's head, would reflect our serious view of Respondent's misconduct, as does our requiring Respondent actually to serve a three-month suspension. No lawyer will doubt our consistent view that misuse of client funds is a most egregious transgression.

Not to stay disbarment here would impose the harshest sanction on an attorney with a good career who failed, with no discernable venal intent, properly to handle a small amount of one client's funds. I believe that, in the context of this case, the guilotine of disbarment can be stayed for a while.

Respondent should be given the opportunity to practice under monitors. Should he then fail to handle client funds in accordance with the Disciplinary Rules the probation should be revoked and the disbarment activated. However, absent further wrongdoing, Respondent should be allowed to continue practice under monitors after his three-month suspension.

The conditions of probation should be that Respondent take at least two continuing legal education courses within six months of the date of the Court's order -- including courses on law office management and legal ethics -- and that Respondent's practice be monitored by financial and practice monitors for three years. Respondent shall promptly certify in writing to Bar Counsel that he has taken and completed the two courses and where and when the courses were taken. Each monitor appointed by the Board will periodically report to the Board's Executive Attorney as to Respondent's progress.

If Bar Counsel learns that Respondent has violated a

condition of probation or the Rules of Professional Conduct during probation, the matter shall be investigated by a Hearing Committee. If, after a hearing, the Hearing Committee were to find that Respondent violated the Rules of Professional Conduct or the terms of probation the Board may determine that Respondent's violation requires immediate probation revocation pendente lite. However, if the Board so decided, Respondent would have the right to petition the Board for a stay of the revocation of probation pending its decision. The Board's decision on revocation would be appealable to the Court. In the event that, during the period of probation, Respondent should engage in further instances of commingling or misappropriation, Bar Counsel may alternatively petition the Court of Appeals directly so that Respondent's probation can be immediately revoked and the disbarment put into effect instanter.

I recommend this approach to the Court not only as a fair and appropriate sanction in the present case, but as a possible innovative approach in comparable cases.

Respectfully Submitted,

_____

Charles R. Donnenfeld
Chair

Members Christensen and Howard join in this Opinion.

Dated: October 27, 1993

APPENDIX F-SEPARATE REPORT AND RECOMMENDATIONS OF THE BOARD OF PROFESSIONAL RESPONSIBILITY

DISTRICT OF COLUMBIA COURT OF APPEALS
BOARD OF PROFESSIONAL RESPONSIBILITY
In the Matter of:
Kenneth A. Pels, Bar Docket No. 228-91
Respondent

DISSENTING OPINION OF MR. JAMES C. McKAY

Disbarment of Respondent, in my opinion, would not be warranted in view of the facts and circumstances of this case. Although I agree that Respondent misappropriated $432 of his client's funds, his conduct did not rise to the level of recklessness as found by the Hearing Committee and the Board majority. Accordingly, the rule handed down by the Court in In re Addams, 578 A.2d 938 (1992), should not be applied.

All of the violations charged by Bar Counsel relate to Repondent's handling of a single matter, i.e., a personal injury case on behalf of Elizabeth Langlois ("Langlois"), who was injured when a motor vehicle collided with her motorcycle. Respondent's misconduct involved commingling, misappropriation, failure to maintain records, failure to render accounts, and failure promptly to deliver client funds.

The relationship between Respondent and Langlois with a retainer agreement (Ex.A) which provided, among other things, that the client agreed "to pay", in addition to Attorney's fees, all reasonable and necessary costs incurred in this matter. Said Attorney shall pay all expenses and charges from monies received from any recovery or settlement." There was nothing in the agreement that required Respondent to pay any expenses or charges within any particular period of time.

The three members of the Hearing Committee found that each of the charges had been proved by clear and convincing evidence. A majority of the Committee concluded that Respondent had handled Langlois' funds in a reckless manner, and, therefore, under Addams , recommended disbarment. One member of the Committee dissented based on her belief that Respondent's misappropriation of his client's funds resulted from no more than simple negligence, and recommended that he be suspended for the period of one year.

RESPONDENT'S EMPLOYMENT BACKGROUND

Respondent was admitted to the Bar of the State of Mississippi in 1962 and to the Bar of the District of Columbia in December of 1969. (Tr. Iat 128, 137)[1/]

He held the position of Assistant Judge Advocate, and later was a Staff Judge Advocate at air bases in Taiwan. He served in the Asian Theater for two years, then was assigned as an Assistant Judge Advocate at Andrews Air Force Base. After a year in that position, he was employed by General Dynamics where he worked on Government Contract matters. Dissatisfied with the travel entailed by that occupation, he returned to the District of Columbia, where he was employed as an Assistant Corporation Counsel. Thereafter, he accepted a position in the Lands Division of the Department of Justice, remaining there until entering private practice for the first time in late 1986. In all, Respondent's unblemished Government career lasted about 25 years. (Tr. I at 138-144, 147-148)

FACTS RELATING TO VIOLATIONS

Respondent became involved with the Langlois matter only a few days after he joined the firm of Borzilleri, Baker and Deamer. (Tr. I at 144) This was the first personal injury case handled by Respondent, and the first time he controlled funds of a private client. (Tr. I at 144, 170; Tr. II at 37) Broadly speaking, Respondent received $20,000 in settlement of Langlois' claim, and disbursed $19,568. He claims that Langlois owes him substantially more than $432 for disbursements incurred in connection with the personal

injury matter.

The evidence regarding the several bank accounts opened by Respondent has been discussed in detail in the Committee Report and Board majority opinion, and need not be repeated here. The uncontradicted evidence showed, as surprising as it may seem, that Respondent was unaware of his ethical obligation to deposit the settlement funds in an escrow account. Instead, acting on the advice of bank employees, he opened an "umbrella" account and a separate operating account in the Citizens National Bank of Maryland, and deposited the funds in the latter account. (Tr. I at 225)

Respondent testified that he replenished the operating account from the umbrella account whenever he realized the funds in the operating account were diminished or exhausted. He also testified that he would have prevented the March 1989 overdraft in the operating account had he not been extensively traveling during that period.

The Hearing Committee was critical of Respondent's banking arrangements, but would not have found a misappropriation had "the combined balances remained above the amounts held in the trust." (Comm.Rep., f.n. 4 at p.20) However, despite Respondent's undisputed testimony that he maintained many thousands of dollars in the umbrella account (Tr. I at 225; Tr. II at 105)[2/], the Committee recommended, and the Board majority agrees, that Respondent be disbarred because "no evidence of a two-tier structure at Riggs or the Damascus bank. (Ibid)

At the heart of this case is the controversy between Respondent and his client over whether or not she owes his firm disbursements indisputably incurred and which indisputably exceeded $432. The Board majority acknowledged that "Respondent incurred significant, non-reimbursed costs on Ms. Langlois' behalf." (Board Op. at 21) Respondent claimed he was entitled to payment of an amount in excess of $432; Langlois disagreed. Respondent claimed that the January 9, 1989, distribution letter (BX 1(a)) did not cover all of the disbursements incurred by his

office; Langlois disagreed.

It is significant, in my opinion, that Langlois received a June 6, 1989, letter from Respondent before any dispute arose between parties, in which Respondent expressly informed her that there were outstanding costs in her account. (Tr.I at 86; RX 5) The letter pointed out that, although certain costs had been waived, "you still have an outstanding costs on your account with us. Those past non-waived costs will be adjusted into your account upon completing the adjusted medical charges. You should note that there will be small additional costs associated with the finalization of your account."

Langlois treated the letter as a "joke." (Tr. Iat 89), and refused to acknowledge that she owed any of the outstanding costs. Langlois could not understand why any costs needed to be waived under the retainer agreement. Respondent obviously did not think he was joking when he informed her of the substantial costs his firm had incurred in her behalf. Respondent had in fact incurred additional costs some of which, in order to give Langlois a break, he unilaterally agreed to waive.

Moreover, Respondent indisputedly incurred expenses, which were never paid, in connection with his representation of Langlois in a matter involving her appearance before the Naval Discharge Board. Although Langlois questioned the amount of work Respondent had done, she conceded that he met with a representatives of the Disability Board, and performed other legal services for her with respect to that matter. (Tr.I at 78-80) He also represented her without charge in connection with the theft of Three motor cycles she owned, and asked him about a few other legal matters "here and there." (Tr. I at 83-84)

Thus, it is clear from the evidence that Respondent believed that, under the provisions of the retainer agreement, Langlois owed him for disbursements far in excess of $432, whereas, Langlois believed that, under the terms of the distribution letter, she was under no obligation to pay those costs. Too bad for her lawyer, as far as she

was concerned, if he omitted to state more specifically the costs he had indisputedly incurred, the amount of which Langlois never questioned.

Moreover, it is pertinent to note that the January 1989 distribution letter described the $500 of administrative costs as being "approximate administrative and miscellaneous expenses." (emphasis added) Respondent obviously underestimated by a substantial amount his "approximate" costs and expenses, which as shown by exhibit R11, amounted to $1,810, even after $500 had been waived.[3/] Ironically, had Respondent not waived any costs, and had he included the total costs of $1,810 in the distribution arrangement, Langlois' portion of the distribution would have been diminished by that amount. But, in his efforts to lend a helping hand, his fingers were chewed off.

LEGAL DISCUSSION

The Hearing Committee's finding, upheld by the Board majority, that Respondent acted recklessly in handling Langlois' funds are supported by the following facts (Comm. Rep. pp. 21-22):

(1) Respondent "did not bother" to or could not calculate the actual cost of his office's disbursements.

(2) Respondent "did not bother" to obtain a bill from Dr. Launder; instead, relied on a telephone inquiry regarding the amount owed the doctor.

(3) Respondent deposited the $20,000 in settlement funds in an account used for business operations and for personal expenses.

(4) Respondent had no "cogent explanations" for the movement of his business accounts to other banks nor did he demonstrate any efforts to trace Langlois' funds into or out of those accounts.

(5) Respondent did not promptly pay Langlois' medical providers.

(6) Respondent never accounted to Langlois for the savings he negotiated with one of the medical providers.

(7) Respondent made no effort to account to Langlois' for that offset.

I agree that Respondent violated disciplinary rules pertaining to commingling (DR 9-103(A); the failure to provide an accounting (DR 9-103(B); Rule 1.15(b); failure to deliver funds to the client (Rule 1.15(b)); and failure to maintain complete records (DR 9-103(B)(3) and Rule 1.15 (a)). I also agree that Respondent misappropriated $432 of his client's funds, in violation of DR 9-103(A), in view of the ruling of the District of Columbia Court of Appeals in In re Harrison, 461 A.2d 1034 (D.C. 1983) ("once the running balance of Harrison's office account fell below the amount held in trust, misappropriation occurred") However, I do not agree, as found by the majority of the Board, that Respondent handled his client's funds in a reckless manner. Rather, I believe that Respondent's conduct amounted to no more than simple negligence or from acts that can be equated to negligence.

Recklessness differs from negligence in several important respects.

> "It differs from negligence that consists in mere inadvertence, incompetence, unskillfullness...in that reckless misconduct requires a conscious choice of a course of action, either with knowledge of the serious danger to others involved in it or with knowledge of facts that would disclose this danger to any reasonable person." 57Am. Jur. 2d, Negligence s302. (emphasis added) See also Restatement, Torts, 2d s500. Comment g.

It is significant, in my opinion, that the conduct found by the majority of the Committee and the Board majority to constitute recklessness consisted principally of acts of omission. He did not deliberately write checks on a trust account to pay personal expenses. There were no affirmative acts on Respondent's part, except the depositing of the settlement funds in an operating account, an act of commingling for which discipline is recommended.

After wading through the mass of documentary material, the testimony, the arguments of the parties, and the Hearing Committee report, the bottom line of the misappropriation issue, as indicated heretofore, is a dispute as to whether the sum of $432 did or did not represent disbursements owed Respondent by his client. Bar Counsel and the Board majority would discipline Respondent for insisting that the funds belong to him by imposing the most severe sanction available to the disciplinary system -- disbarment. Under the facts and circumstances of this case, that would be Draconian punishment, to say the least, to inflict on an attorney who, up until the handling of his first personal injury case, had an unblemished record for more than twenty-five years. 4/

Decisions of the District of Columbia Court of Appeals

In order to determine whether or not the harsh sanction of disbarment should be imposed in this case, it is necessary to turn initially to the decision of the District of Columbia Court of Appeals in Matter of Addams, 579 A.2d 190 (D.C. App.1990) (en banc). That case was heard en banc for the purpose of considering whether there should be a per se disbarment rule for intentional misappropriation and, if not, the extent to which mitigating factors are relevant in determining the appropriate sanction. (579 A.2d at 191) The Court reaffirmed that:

> "[I]n virtually all cases of misappropriation disbarment will be the only appropriate sanction unless it appears that the misconduct resulted from nothing more than simple negligence. While eschewing a per se rule, we adhere to the presumption laid down in our prior decisions and shall regard a lesser sanction as appropriate only in extraordinary circumstances." (Ibid)

The Court referred to In re Kersey, 520 A.2d 321 (D.C. 1987) as an example of a case in which extraordinary circumstances were found, then continued:

> "But as a matter of course, the mitigating

> factors of the usual sort, see e.g., In re Reback, 513 A.2d 226, 233 (D.C. 1986) (en banc), will suffice to overcome the presumption of disbarment only if they are especially strong and, where there are aggravating factors, they substantially outweigh any aggravating factors as well." (Ibid)

Presumably, in view of the Court's ruling in Kersey (involving thirty-four Code violations), the conduct of a misappropriating respondent could be caused by something more than simple negligence, and yet a sanction less severe than disbarment be imposed under "extraordinary circumstances." I also presume that the extraordinary circumstances need not necessarily involve alcoholism, as in Kersey, or another addiction that substantially caused the misconduct.

In my view, Respondent's conduct in the instant case amounted to something different from but equivalent to simple negligence. His failure to deposit client funds in an escrow account on advice of employees of the bank, and his allowing the account to drop below the amount he was required to disburse, stemmed from ignorance or incompetence rather than negligence, and did not reach the level of recklessness or dishonesty.

It does not appear that the Court, in Addams, overruled its decisions in earlier misappropriation cases. Accordingly, it should be helpful, in determining the sanction that ought to be imposed in the instant case, to review the rationale followed by the Court in key misappropriation decisions where disbarment was imposed, and in key decisions in which it was not imposed.

Cases In Which Disbarment Was Ordered
Matter of Burton, 472 A.2d 831 (D.C. 1984)

The respondent, a court-appointed trustee, made unauthorized withdrawals of funds from the trust account for his own personal and business uses and for purposes not related to the trust, and made deposits from unidentified

sources into the account. The unauthorized withdrawals amounted to thousands of dollars. A year after the trust was established, the account contained only $191.30 of the $10,495.99 for which the respondent was accountable.

The Court adopted the Board's finding that the respondent's use of trust funds for purposes unrelated to the purpose of the trust constituted misappropriation of funds. (472 A.2d at 838)

Matter of Buckley, 535 A.2d 863 (D.C. 1987)

The respondent received the sum of $5,288.00 as a portion of a settlement of a personal injury case to be used to pay his client's medical bills. Instead of maintaining the funds in a separate trust account, Respondent spent the entire amount to pay his own personal and professional expenses; in fact, he used the account as an office account, finally reducing the balance to the sum of $12.00. The Court, in finding that the respondent had misappropriated his client's funds reaffirmed the definition of misappropriation laid down in In re Harrison, 461 A.2d 1034, 1036 (D.C. 1983):

> "'[A]ny unauthorized use of client's funds entrusted to [the lawyer], including not only stealing but also unauthorized temporary use for the lawyers own purpose, whether or not he derives any personal gain or benefit therefrom.'" (535 A.2d at 866)

Matter of Addams, 563 A.2d 339 (D.C. 1989);

579 A.2d 190 (D.C. 1990 (en banc))

The respondent received the sum of $1,291.73 from a client for placement in a trust account. He wrote a check on the account to a noteholder in the amount of $530.37. On the day he wrote the check, the trust account balance was $334.05, causing the check to be dishonored.

The task of the Court, in its en banc, opinion was to determine the sanction to be imposed where there had been an "intentional misappropriation of client funds." (579 A.2d at 192) It reviewed its earlier decisions, as well as

decisions in other jurisdictions, and stated that, "this court, like others, has recognized that a per se rule would be inequitable since there may be circumstances in which disbarment will not be the appropriate discipline for intentional misappropriation of client funds." In making that pronouncement, the Court referred to the ABA Standards for Lawyer Discipline and Disability Proceedings Standard 7.1 which provides that "courts should avoid adoption of rules that mandate dispositions for certain forms of misconduct since fixed penalties limit ability to address complexity and variety of circumstances in each case." (579 A.2d at 194)

The Court again cited Kersey as one such case, as well as cases from other jurisdictions, and went on to say that:

> "There may well be other circumstances involving a member of the bar that will cause the court to reach a similar conclusion. We have no occasion to define those circumstances here other than to reaffirm that it is appropriate for the court to consider the surrounding circumstances regarding the misconduct and to evaluate whether the mitigating factors are highly significant and, where there are aggravating factors, they substantially outweigh any aggravating factors such that the presumption of disbarment is rebutted." (Id. at 195)

Noting that the exception should not be "read too broadly," the Court concluded that, "in all events, it must be clear that giving effect to mitigating circumstances is consistent with protection of the public and preservation of public confidence in the legal profession." (Ibid)

In re Robinson, 583 A.2d 691 (D.C. 1990)

In the Robinson case, the respondent cashed a settlement check which he used for his own purposes. He failed to turn over his client's share of the settlement despite repeated requests that he do so. He eventually gave his client a check drawn on an account he knew to have

insufficient funds, and twice told the client that there were sufficient funds. He also falsely told his client that the bank had told him the check would be honored. He offered to pay the client the full amount of the settlement if she would refrain from complaining to Bar Counsel. The respondent also gave Bar Counsel incorrect information about the check.

The Court ordered the respondent's disbarment, noting existence of aggravating factors, including the incidents of knowing dishonesty and the attempt to do what was tantamount to offering a bribe to his client.

In re Thompson, 583 A.2d 1006 (D.C. 1990)

The respondent deposited in his trust account $12,500 of a $13,000 check received in settlement of a client's personal injury claim. Within the next two weeks, he made three withdrawals from the account, reducing the balance to less than $200. Respondent failed to pay $3,000 in medical bills of his client that were outstanding.

The Court had no difficulty in finding that the respondent had intentionally misappropriated client funds and that his conduct was dishonest (583 A.2d at 1007), pointing out once again that disbarment is the appropriate sanction unless the conduct results from mere negligence. (Id. at 1008)

In re Micheel, 610 A.2d 231 (1992)

The respondent deposited $144,200.00 received from the sale of his client's house into his regular office checking account. He paid out $141,560.85 to the seller and mortgage holder, leaving the sum of $2,639.15 in his possession, which was to be used to pay state and county taxes and fees.

The respondent wrote two checks in the amount of $1,317.44 and $1,345.00 respectively on the account; both checks were dishonored for insufficient funds. The account was overdrawn by $59.71. During the relevant period, the respondent wrote thirteen other checks that were dishonored for insufficient funds, and also wrote additional

checks that were honored.

The issue before the Court was whether the respondent's conduct was the result of simple negligence or whether, as the Board found, his conduct was reckless. The Court agreed with the Board, stating:

> "The evidence in the instant case....shows that Mr. Micheel made no attempt to keep track of his client's funds, but indiscriminately wrote checks on the account at a time when he knew or should have known that the account was overdrawn. The Board's conclusion that Micheel misappropriated funds as a result of reckless disregard for the security of his client's funds rationally flows from the undisputed facts. We therefore uphold the Board's legal conclusion that misappropriation in this case was the result of Micheel's recklessness." (610 A.2d at 236)

Cases In Which Suspension Was Ordered In re Harrison, 461 A.2d 1034 (D.C. 1093)

The respondent deposited funds received for his client from a personal injury settlement in his general office account. Thereafter, the client made a series of unanswered requests that the respondent pay medical bills from settlement funds. Although the respondent claimed he was busy and had not intended to evade his client, the Board found to the contrary.

The respondent wrote a check which was returned for insufficient funds because the balance in the general office account had fallen below the amount owed the client. The dishonoring of the check violated an agreement with the bank to extend instant credit to cover all checks. The respondent claimed that he was unaware that the account had become depleted; the Court found that his "sloppy" bookkeeping techniques contributed to his lack of knowledge. (461 A.2d at 1035)

The respondent finally paid the client his share of the

settlement, but did not pay the medical bills until about two weeks later.

The Court adopted the Board's recommendation that the respondent be suspended from practice for a year and a day based on the finding that he misappropriated client funds he had commingled with his own. In taking that action, the Court defined "misappropriation" in the manner pointed out, supra. It then concluded that, "once the running balance of Harrison's office account fell below the amount held in trust for [the client], misappropriation had occurred." (Id. at 1036)

The Court decided not to order disbarment because "the facts in this case were less egregious than those in cases where disbarment was ordered... Thus, Harrison's defense of inadvertence, while insufficient to defeat the charges against him, did justify a lesser sanction than imposed [in other cases]." (Ibid)

In re Hines, 482 A.2d 378 (D.C. 1984)

In this case, although the respondent was not charged specifically with misappropriation of client funds, the Court found that there was misappropriation as well as commingling, and pointed out that this fact had a "direct bearing on our choice of sanction to be imposed." (482 A.2d at 380-381, f.n. 8)

The Court adopted the Board's finding that the respondent's "indiscriminate deposit of admitted escrow money into his personal account, combined with his failure to keep running account balances and to examine his monthly banking statements, demonstrated a 'reckless disregard' for the status of the accounts in which he deposited his client's money, and gave rise to an inference that there was an intent on respondent's part to deal with and use the funds escrowed for clients as his own." (Id. at 380)

The Court also agreed with the Board's recommendation that the respondent be suspended for a period of two years, and took that occasion "to notify the bar that in future misappropriation cases disbarment will ordinarily be the

sanction imposed by this court. We stress the word 'ordinarily,' for every case must turn on its own particular facts." (Id. at 386)

In re Hessler, 549 A.2d 700 (D.C. 1988)

In this case, the respondent deposited his client's funds into his operating account and wrote checks to pay his own bills. Furthermore, he misappropriated his client's funds by allowing the account balance on numerous occasions to fall below the amount of his client's funds. Specifically, the respondent allowed his operating account to fall below the $912.00 that concededly belonged to his client. The respondent did not keep a running balance on his operating account; he did not balance the monthly statements himself, but sent them to an independent bookkeeper as the statements were received by him. The Court agreed with the Board's conclusion that the misappropriation was not intentional but was negligent and inadvertent, and ordered that the respondent be suspended for six months.

In re Evans, 578 A.2d 1141 (D.C. 1990)

In that case, the Court and Board, unlike the Board majority and the Committee in the instant case, did not reject the respondent's contention that he "reasonably but mistakenly believed that his actions [in paying to himself an unauthorized attorney fee] were proper and so did not engage in conduct involving dishonesty" (578 A.2d at 1143) (emphasis added), and ordered that respondent be suspended for six months. In reaching its decision to recommend suspension and not disbarment, which was adopted by the Court, the Board emphasized the seriousness of the respondent's misconduct as follows:

> "Although the amount of money involved in this violation is small..., the funds were taken while Respondent was serving in a fiduciary capacity. In that role, he was charged with the highest responsibility to safeguard the assets of the estate and the interest of the heirs. This was particularly

important in this case, where the heirs were unsophisticated and vulnerable. Respondent was more than 'lax and casual' in the handling of this estate; he was insensitive to his fiduciary responsibilities and he violated those responsibilities." (Id. at 1151)

In re Cooper, 591 A.2d 1292 (D.C. 1991); 613 A.2d 938 (D.C. 1992 (en banc)

In that case, the respondent used an escrow account, established for his client's funds received from the settlement of a personal injury claim, as his personal checking account, even though he had expressly designated it as being his client's account.

There was a dispute between the parties as to whether the respondent was entitled to legal fees for services rendered in connection with matters unrelated to the personal injury case. The respondent deducted all of the legal fees from the escrow account, whereas the client contended he was entitled to deduct only the fee relating to the personal injury claim. The Court found that, giving the respondent all of the benefits of the doubt, it was "clear that [he] withdrew at least $115.75 more than authorized." (591 A.2d at 1295)

The Court, in discussing the question of sanctions, noted that prior to oral argument the en banc opinion in Addams had been handed down, pointing out in particular that, except in a case involving nothing more than simple negligence, "a lesser sanction [than disbarment] is appropriate only in extraordinary circumstances where, for example, the mitigating factors are strong enough to overcome the aggravating factors (if they are present) and the presumption of disbarment." (591 A.2d at 1297) Accordingly, the Court remanded the case to the Board to enable it to make an appropriate recommendation of sanction under the Addams standard. (Id. at 1297)

Relying on the Court's decision in Evans, supra, the Board on remand recommended suspension for a period of

six months. The Court, in upholding the Board, referred to its earlier Cooper decision in which it recognized that "Cooper's state of mind could render his action the 'equivalent' of simple negligence, or it could involve 'something more serious.'" (613 A.2d at 939) The Court had some reservation as to whether the Board, in invoking Evans, "necessarily was of the view that Cooper's mistaken belief was objectively reasonable, like Evans," but went on to state:

> "However, given the specificity of our remand, we do conclude that, to the extent that Cooper's belief was not well founded in fact, the Board in effect considered that his failure to understand the true state of authority in this family dealing involved simple negligence or its equivalent, at least so as to warrant no greater penalty than imposed in such cases." (Id. at 939)

In re Choroszej, 624 A.2d 434 (D.C. 1992)

In this case, the Board and Court chose to believe the respondent's story that he thought medical payment had been made, despite the fact that his clients informed him the bills were unpaid, and even showed him bills received from the doctor. Erroneously believing that the trust account contained only funds to which he was entitled, the respondent wrote checks on the account for rent and other personal expenses, causing the balance to drop below the amount entrusted to him to cover the medical bills.

The Board and Court concluded that the respondent misappropriated his client's funds, but that his conduct in reducing the trust fund below the balance to be paid the doctor amounted to no more than negligence. Accordingly, a six-month suspension was ordered by the Court.

Conclusion and Recommendation

Respondent's conduct, in my opinion, was less egregious than the conduct of the respondent's in the above cases in which disbarment was ordered, and even

less egregious than the conduct of some of the respondents in cases in which a suspension was ordered by the Court.

Since the Committee majority and Board majority have concluded that Respondent acted recklessly, it would be informative to compare the facts and circumstances in this case with those involved in Micheel, where the respondent was found to have acted recklessly in the handling of his client's funds.

In Micheel, the respondent, just as did this Respondent, deposited the client's funds in his regular office checking account. However, Micheel, unlike Respondent, "made no attempt to keep track of his client's funds, but indiscriminately wrote checks on the account when he knew or should have known that the account was overdrawn." (610 A.2d at 236) Thirteen checks were dishonored, and additional checks, which were honored, were written on the account. Micheel had no basis whatsoever for claiming a right to the misappropriated funds, nor, did he attempt, as did Respondent in the instant case, to keep the account at the appropriate level by making deposits from another account. His conduct, found by the Court to have constituted recklessness, clearly rose to a high level of culpability than did the conduct of Respondent.

I believe that the actions of the respondents in Cooper, Hessler, Evan, and Choroszej, in which the Court ordered suspensions, were more comparable to Respondent's conduct than were the actions of the disbarred respondents.

In Cooper the dispute between the respondent and his client over whether the respondent was entitled to a fee was analogous to the dispute in the instant case as to whether or not Respondent was entitled to the disbursements unquestionably incurred by his office on Langlois' behalf. There, the Court ordered only a six month suspension.

In Hessler, the respondent deposited his client's funds

into his operating account, and wrote checks to pay his personal bills, conduct which, in my view, was deliberate and no less egregious than Respondent's conduct. The Court ordered a six-month suspension, finding Hessler's misappropriation to have been unintentional and inadvertent, even though he had deliberately chosen not to balance his monthly statements, but sent them to an independent bookkeeper to perform that vitally important task.

In Evans, the respondent believed that his actions in retaining his client's funds were proper, as did Respondent in the instant case. Despite the recognized seriousness of Evan's misconduct, the Board and the Court determined that the sanction should be only a six-month suspension.

In Choroszej , just as here, the respondent allowed a trust account to drop below the amount owed a medical provider. The Court again ordered a suspension of six months.

Apparently feeling the need to bolster its disbarment recommendation in light of the Court's observations in Addams (579 A.2d at 191), the Committee majority surprisingly found no mitigating factors, although Respondent's nearly thirty-year record is unblemished, and yet strained mightily to find what it called "aggravating factors."

I do not believe that the actions criticized by the Committee should be considered matters in aggravation. The last minute efforts to delay the hearing were made by Respondent's counsel, and not by Respondent, because of the unexpected unavailability of two witnesses. The issue became moot when the Committee denied Respondent's motion. The fact that Respondent did not "candidly advise" the Committee that one of the witnesses was his daughter is, in my opinion, a non sequitur , and, in any event, probably was either the product of oversight or the advice of counsel. The failure to submit a deposition transcript of a witness previously thought to be "critical," is not an uncommon tactic during an adversarial proceeding, and ,

again, likely was advised by counsel. The asserted "combative and sometimes even insolent demeanor" complained of by the Committee majority, and Respondent's alleged failure to comprehend the seriousness of the charges or his acts, assuming the Committee's attempted probe of his mental processes is accurate, undoubtedly reflected Respondent's sincere belief, repeatedly evidenced during his testimony, that he has been unjustly accused of wrongdoing by a client who got more than she deserved.

As the Court noted in Hines, "every case must turn on its own particular facts." (482 A.2d at 380) The particular facts of this case fall far short of justifying disbarment, and, in my opinion, a suspension of six months would be "consistent with protection of the public and preservation of pubiic confidence in the legal profession." Matter of Addams, (579 A.2d at 195)

Respectfully Submitted,

_____

James C. McKay

Dated: October 25, 1993

APPENDIX G-PERTINENT TEXT FIFTH AMENDMENT OF THE FEDERAL CONSTITUTION PROVIDES:

"NO PERSON SHALL...BE DEPRIVED OF LIFE, LIBERTY, PROPERTY, WITHOUT DUE PROCESS OF LAW,"

PERTINENT TEXT FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION, IN SEC. 1 PROVIDES:

"NO STATE SHALL..... DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW."

Supreme Court, U.S.
FILED
JUN 12 1996
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No. 95-1841

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KENNETH A. PELS, SR.,

Petitioner,

vs.

DISTRICT OF COLUMBIA BAR ASSOCIATION,

et al.

On Petition for a Writ of Certiorari
to the District of Columbia Court of Appeals

BRIEF FOR DISTRICT OF COLUMBIA BOARD ON PROFESSIONAL RESPONSIBILITY AND BAR COUNSEL IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the District of Columbia Court of Appeals correctly ordered Petitioner's disbarment and restitution of $432 to a former client, based upon his misappropriation of funds belonging to the client and related violations of the rules of professional conduct applicable to members of the District of Columbia Bar.

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals, disbarring Petitioner and ordering restitution (Pet. App. 1), appears at 653 A.2d 388 (D.C. 1995).

JURISDICTION

The judgment of the court of appeals for which review is sought was entered January 30, 1995. Petitioner filed a motion for leave to enlarge the time within which to file a petition for rehearing or rehearing *en banc,* which motion to enlarge the court granted by order entered March 8, 1995. The court denied Petitioner's petition for rehearing or rehearing *en banc* by order entered December 12, 1995. Petitioner initially filed his petition

for writ of certiorari on or about March 13, 1996 (the precise date is unknown to respondents), and the Clerk rejected the filing as out of compliance with the Court's rules. Petitioner refiled his petition on May 13, 1996.

STATUTE AND RULES

The pertinent statute conferring jurisdiction on the court of appeals to discipline members of its Bar, and relevant rules of professional conduct prescribed by the court and of procedure prescribed by the Board on Professional Responsibility, are set out in an Appendix to this brief.

STATEMENT OF PROCEEDINGS BELOW

Petitioner is a disbarred attorney and former member of the District of Columbia Bar. He was the subject of formal disciplinary charges proffered by the Office of Bar Counsel, arising from his legal representation of Elizabeth Langlois in a personal-injury claim.[1] Throughout the disciplinary proceeding below, Petitioner was represented by legal counsel. A hearing committee of the Board on Professional Responsibility concluded that Petitioner had misappropriated his client's funds, among other ethical infractions, and recommended his disbarment. The Board on Professional Responsibility upheld the finding of misappropriation but divided concerning the proper sanction.

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[1] Kenneth Pels, the Petitioner here, is referred to as the "Respondent" throughout the proceedings below.

The District of Columbia Court of Appeals upheld the finding of misappropriation. The court ordered Petitioner's disbarment and restitution of $432 to the former client. The court subsequently denied Petitioner's applications for rehearing and/or rehearing *en banc*.[2]

The proofs received at the evidentiary hearing showed that Petitioner entered into a contingent-fee agreement with his client in 1986 to handle her personal injury claim. Petitioner received settlement funds on his client's behalf in 1989 but failed to distribute in a timely manner the portion due medical providers as provided in a disbursement sheet furnished the client. Rather than safeguard the entrusted funds in an escrow account, as he was required to do under the applicable rules of professional conduct, Petitioner deposited the funds in a personal bank account. Thereafter, in payment of his client's medical obligations, he tendered checks, drawn on his personal account, that were returned for insufficient funds. Ultimately, he negotiated a reduction in one of the medical bills. He pocketed the savings without notifying his client that he had recovered additional sums on her behalf. 653 A.2d at 391-92 (Pet App. 3-7).

The hearing committee, the Board and the court of appeals all agreed that Petitioner's misappropriation of client funds was the product of intentional or reckless behavior rather than mere inadvertence or negligent mistake. Under well-settled decisions in the District of Columbia, the disciplinary sanction for such professional misconduct is disbarment. *See In re Addams,* 579 A.2d 190 (D.C. 1990) *(en banc)*.

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[2] The Board on Professional Responsibility is a nine-member body appointed by the Court of Appeals pursuant to D.C. App. R. XI, Sec. 4 to oversee the administration of the District of Columbia Bar's disciplinary system and to serve as an intermediate appellate tribunal in the review of original cases brought by Bar Counsel, who is appointed by the Board. The District of Columbia Bar Association is a voluntary organization that has no connection with the present proceeding. The undersigned Bar Counsel appears here on his own behalf and that of the Board; he does not appear on behalf of the Association.

ARGUMENT

Petitioner disclaims any effort before this Court to contest his disbarment (Pet. 4). Rather, he appears to seek this Court's review of the court of appeals' order of restitution. That order rests upon the court's determination that the settlement funds remaining in Petitioner's hands after he negotiated a reduction in his client's medical bill belonged to the client rather than to him. The question sought to be presented is not properly before the Court and, in any event, does not merit review. *See* Sup. Ct. R. 10.

1. The contention that the ruling below amounts to an infringement of Petitioner's freedom of contract was not presented below. Although Petitioner argued unsuccessfully that he was entitled under his retainer agreement with the client to retain the surplus remaining after he secured the reduction in the medical bill, he never asserted that an unfavorable ruling on that issue would amount to a deprivation of a right secured him under the federal constitution. Thus, the question is not available to Petitioner now.

2. Petitioner's federal constitutional claim rests upon a factual premise rejected by the court below. Petitioner argued that his retainer agreement with the client permitted him to recoup unspecified expenses, notwithstanding a clause in the disbursement sheet that waived administrative expenses above a stipulated amount. The hearing committee, the Board and the court of appeals all ruled adversely to Petitioner on this issue, concluding that the waiver language in the settlement sheet was controlling. 653 A.2d at 391 (Pet. App. 18-20). The court's order directing restitution followed a settled line of cases in which the respondent attorney has been required to restore client funds as a remedy ancillary to the disciplinary sanction. *In re Robertson,* 612 A.2d 1236, 1239-40 (D.C. 1992) (collecting cases); *In re Solomon,* 599 A.2d 799 (D.C. 1991).

3. The judgment below disbarring Petitioner rests upon the independent ground that he committed intentional or reckless misappropriation when he initially deposited his client's settlement funds in non-escrow accounts, the balances of which thereafter fell below the levels required to satisfy his ethical obligations in handling the entrusted funds. 653 A.2d at 395-98 (Pet App. 12-16). That finding mandated Petitioner's disbarment under the *Addams* rule without regard to his subsequent mishandling of the balance remaining at the conclusion of the legal representation.

4. Petitioner's remaining contention that Bar Counsel somehow engaged in fraud or other misconduct in withholding evidence concerning the client's understanding of her retainer agreement with Petitioner (Pet. 8-9) was not raised below and in any event is without merit. Ms. Langlois appeared as a Bar Counsel witness at the hearing and was available for cross-examination. *See* Pet. App. 27. Pursuant to the Board's rules, Bar Counsel's files were available to Petitioner for inspection and copying at any time during the disciplinary proceeding. *See* Board Rule 3.1 (Resp. App. 2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel:

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Assistant Bar Counsel
District of Columbia Bar Counsel

June 1996

APPENDIX

STATUTES AND RULES

District of Columbia Code, Sec. 11-2502:

> "The District of Columbia Court of Appeals may censure, suspend from practice, or expel a member of its bar for crime, misdemeanor, fraud, deceit, malpractice, professional misconduct, or conduct prejudicial to the administration of justice. A fraudulent act or misrepresentation by an applicant in connection with this application or admission is sufficient cause for the revocation by the court of such person's admission." (July 29, 1970, 84 Stat. 521, Pub. L. 91-358, title I, Sec. 111; 1973 Ed., Sec. 11-2502; June 13, 1994, Pub. L. 103-266, Sec. 1(b)(112), 108 Stat. 713.)

District of Columbia Court of Appeals Rule XI Governing the Bar, Sec. 3:

> "(a) Any of the following sanctions may be imposed on an attorney for a disciplinary violation: (1) Disbarment by the Court . . .
>
> "(b) When imposing discipline, the Court or the Board may require an attorney to make restitution either to persons financially injured by the attorney's conduct or to the Clients' Security Trust Fund . . . , or both, as a condition of probation or of reinstatement."

District of Columbia Code of Professional Responsibility, Disciplinary Rule 9-103(A):

> "All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be

deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein . . . "

District of Columbia Board on Professional Responsibility, Rule 3.1:

"During the course of an investigation of a complaint and following the filing of a petition, respondent shall have access to all material in the files of Bar Counsel pertaining to the pending charges that are neither privileged nor the work product of the Office of Bar Counsel. Respondent may, upon two working days' notice, orally request access to such files. Any dispute arising under this chapter shall be resolved, after the filing of a petition, by the Hearing Committee Chair upon written application by respondent."